

San Francisco Law Library

No.

Presented by

EXTRACT FROM BY-LAWS.

Section 9. No book shall, at any time, be taken from the Library Room to any other place than to some court room of a Court of Record, State or Federal, in the City of San Francisco, or to the Chambers of a Judge of such Court of Record, and then only upon the accountable receipt of some person entitled to the use of the Library. Every such book so taken from the Library, shall be returned on the same day, and in default of such return the party taking the same shall be suspended from all use and privileges of the Library until the return of the book or full compensation is made therefor to the satisfaction of the Trustees.

Sec. 11. No books shall have the leaves folded down, or be marked, dog-eared, or otherwise soiled, defaced or injured. A party violating this provision, shall be liable to pay a sum not exceeding the value of the book, or to replace the volume by a new one, at the discretion of the Trustees or Executive Committee, and shall be liable to be suspended from all use of the Library till any order of the Trustees or Executive Committee in the premises shall be fully complied with to the satisfaction of such Trustees or Executive Committee.

760

No. 2150

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

THE PACIFIC COAL AND TRANSPORTATION COMPANY (a corporation) and
M. D. McCUMBER,

Appellants,

vs.

PIONEER MINING COMPANY
(a corporation),

Appellee.

BRIEF FOR APPELLANTS.

ALBERT H. ELLIOT,

WM. A. GILMORE,

GEO. B. GRIGSBY,

ELWOOD BRUNER,

Attorneys for Appellants.

Filed this.....*day of October, 1912.*

FRANK D. MONCKTON, Clerk.

By.....*Deputy Clerk.*

Records of U.S. Circuit Court
appeals

760

appeals.

No. 2150

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit.

THE PACIFIC COAL AND TRANSPORTATION COMPANY (a corporation) and
M. D. McCUMBER,

Appellants,

vs.

PIONEER MINING COMPANY
(a corporation),

Appellee.

BRIEF FOR APPELLANTS.

Statement of the Case.

This is a suit to quiet title brought by the Pioneer Mining Company, a corporation, appellee, against The Pacific Coal and Transportation Company, a corporation, and M. D. McCumber, appellants, the real property involved in the controversy being a certain mining claim located in the Nome Mining District, Alaska, and known generally as "Bench No. 1 on Moonlight".

The action was tried before the Judge of the District Court of Alaska sitting without a jury and judgment was rendered upon findings of fact and conclusions of law in favor of appellee and against appellants. Appellants made a motion for a new trial in the Court below, which motion was denied, and appeal is now taken from the order denying said motion and also from the final judgment in the case, and the appeal is based upon three bills of exceptions setting forth in narrative form, all of the evidence taken at the trial including the oral testimony of witnesses, and also a large number of exhibits, consisting of maps, location notices, leases, and other documents of that character.

There is found in the Transcript an assignment of errors containing 79 specifications wherein it is alleged that the judge of the lower Court committed error in the trial of the action. The purpose of this appeal is to secure a reversal of the judgment wherein appellants were deprived of their property, and either to have judgment directed in favor of appellants and against appellee upon the testimony adduced, or to have the judgment of the lower Court set aside and a new trial granted.

The Facts.

On the 3rd day of January, 1899, one W. N. Grant located a claim consisting of twenty (20) acres of placer mining ground near the mountain

known as Anvil, and described generally as commencing at the eastern end of a certain claim belonging to one Robert Lyng, and extending in an easterly direction 1320 feet and 330 feet on each side of the center east side stake of the said claim of Robert Lyng (Trans. p. 228).

All of the acts necessary to make a valid location were performed by the said W. N. Grant, and his location notice was filed for record on January 17, 1899, and is found in vol. 3, page 59, of the Records of the Cape Nome Mining District. After the location of the claim by Grant, and on the 4th day of October, 1901, the Pacific Coal and Transportation Company filed an amended location notice upon the same ground, which amended location was filed for record October 7, 1901, in Vol. 95 of the Records of the Cape Nome Mining District, at page 225.

On the 31st day of March, 1900, the said W. N. Grant conveyed a one-half interest in his claim by deed to the Corwin Trading Company, a corporation, and on the 8th day of August, 1901, the said corporation conveyed the same interest to the appellant, Pacific Coal and Transportation Company.

On the 4th day of October, 1901, the said appellant filed its amended location upon the claim. Thereafter, the said corporation advertised out its co-owners, W. N. Grant and his associates, for failure to do or pay for their assessment work for the years of 1900 and 1901 (Trans. pp. 617, 618). On the 15th day of August, 1908, the said corporation leased the claim to M. D. McCumber, the other ap-

pellant in the case, and the period of the lease was continued in writing by the lessor until the time of the trial in the Court below. Assessment work was done on the claim by the appellants and their predecessors in interest, for each year beginning with 1899 and ending with the year 1910, and proofs of labor for nearly every year were filed. There does not seem to be much controversy upon this point.

From the time the claim was located and up to the very time of the trial the appellants and their predecessors in interest, were in physical possession of the claim and did a vast amount of mining work thereon. We shall later in the brief call attention to the evidence in detail upon this point.

The controversy between appellants and appellee arises from an alleged conflict on a portion of the claim of appellants. It is contended by appellee that the western portion of the claim of appellants is really a part of another claim called the Moonlight Bench Claim No. 1, which was located by Mr. Andrew Jensen on January 3, 1899. This Moonlight Bench Claim No. 1 overlaps both the claim of Robert Lyng known as Moonlight Claim, and also the Grant Claim of appellants. Appellee acquired the said Jensen Claim by mesne conveyances.

Appellants were in actual physical possession of their Grant Claim including the conflict portion thereof, at the time of the trial and their possession and that of their predecessors in interest, had

been open, notorious, adverse, continuous, and against all the world except the Government of the United States, from the time of the location until the very moment of the trial of the action. They and their predecessors in interest did a vast amount of work and expended quite a sum of money *upon the conflict portion of the claim*. Their possession for over ten years was undisturbed. Their work upon the claim was not interfered with. Through the frozen muck they drove their shafts and tunnels with the perseverance and industry which only a miner, beckoned on by hope, can exhibit. When they had reached the pay streak, appellee came down upon them, set up a conflict, and sought to reap the reward of their industry. Can this be successfully done under the letter and spirit of the law?

The Law.

I.

THE MOTION OF DEFENDANTS (APPELLANTS) FOR A JURY TRIAL OF THE ACTION SHOULD HAVE BEEN GRANTED, BUT IN ANY EVENT DEFENDANTS' MOTION TO SUBMIT SPECIAL ISSUES OF FACT TO A JURY SHOULD HAVE BEEN ALLOWED.

Both of these propositions are presented in the Bill of Exceptions No. 1, found on pages 110 and 120 of the transcript, and also in Assignment of Errors No. 1. The facts are as follows:

Plaintiff in the Court below brought his action under Section 475 of the Code of Civil Procedure

of Alaska (Carter's Codes, p. 246), and alleged that he was in possession of the claim in controversy. The complaint was verified and defendants filed verified answers in which they both denied specifically the allegations of plaintiff's complaint. The defendant, McCumber, further pleaded his written lease from his co-defendant, the Pacific Coal and Transportation Company, and set forth in detail his possession, and denied the possession of plaintiff. But furthermore the said defendant served and filed an affidavit together with his motion for a jury trial, in which he alleged that he "is in possession of the ground in controversy and is engaged in mining thereon" (Trans. p. 113).

No counter showing whatever was made by plaintiff except such as is contained in his general formal allegation of possession found in Paragraph IV of his complaint (Trans. p. 2). Three questions seem to claim our attention, (a) Is the defendant bound by the allegations of the complaint so that he cannot by motion or otherwise controvert said allegations before the actual trial of the case? (b) Can a plaintiff out of possession in fact drive a defendant in possession into a Court of equity and deprive him of his constitutional right to a trial by jury? (c) Is a suit to quiet title a substitute for an action in ejectment?

It seems obvious to us that if a mere allegation of fact in a complaint were to be deemed to be conclusive on the question of possession, then never could a defendant in possession avail himself of the

right to a jury trial in an action involving title to real property if the plaintiff were willing to allege his possession in the complaint. Since possession is the very fact at issue, it would be absurd to say that a defendant must first try out that fact to determine whether he can have a jury trial, because then a jury becomes indeed superfluous, after the Court has heard and decided the very question at issue. But when a defendant on oath denies the possession of plaintiff and asserts possession in himself and makes up a preliminary issue by motion, the Court must consider the matter as other preliminary issues are disposed of. Otherwise no defendant can ever secure his right to a trial by jury of the question of the ownership of his land, provided a plaintiff is willing to allege in his pleading that he is in possession of the land of the defendant. Not only do we thus have a suit to quiet title substituted for an action in ejectment, which in its primary essence was a suit to determine the right of possession, but the action of ejectment with its right to trial by jury will on this hypothesis cease to be used in litigation. This analysis compels us to make an investigation into the nature and scope of what is known as a suit to quiet title. And in our investigation we shall consider the opinion of the learned Court below rendered in deciding the motion under consideration and found on pages 8 to 18 of the transcript. It is obvious that the learned Court decided the motion entirely on the pleadings

and therefore on the allegations of fact, contained in the complaint, solely.

The Alaska statute, Section 475, C. C. P., reads as follows:

“Any person in possession, by himself or his tenant, of real property, may maintain an action of an equitable nature against another who claims an estate or interest therein adverse to him, for the purpose of determining such claim, estate, or interest.”

It is conceded that the action at bar is brought under this section. Obviously it can be no answer to our argument to say that the Court after a trial of the issues, found as a fact that the plaintiff was in possession at the time the action was brought, because then we shall be conceding that only a trial of the Court can determine the very question which defendants wish tried by a jury. On a motion, however, if the Court found *prima facie* that the defendants were in possession and plaintiff out of possession, the final determination of the question could be well left to a jury and all the rights of the defendants preserved.

The California statute comparable with the Alaska statute is Section 738 of the Code of Civil Procedure and reads in part as follows:

“An action may be brought by any person against another who claims an estate or interest in real property, adverse to him, for the purpose of determining such adverse claim;

“* * * and provided, however, that nothing herein contained shall be construed to deprive a party *of the right to a jury trial* in any case, where by the law, such right is now given” (italics not ours).

It is very interesting to compare the California statute with the Alaska statute, and then to examine the cases which have been decided under the California statute. We assume that the condition in the Alaska statute to the effect, that the person, who brings the action under said statute, must be in possession of the property, in view of the fact that there is no such provision in the California statute, should be of some significance.

The leading case decided in the State of California and a case which we insist has been followed very generally, is the case of

Donahue v. Meister, 88 Cal. 122.

The facts show that the action was a suit involving a mining claim and was brought under Section 738 of the Code of Civil Procedure. The complaint in the usual form avers that the plaintiff was in possession. In the answer the possession of the plaintiff is admitted and possession is also alleged in the defendant, prior to a certain date when it is alleged the plaintiff wrongfully and unlawfully entered and ousted defendant therefrom. At the proper time the defendant demanded a jury on the issue raised by said averment of prior pos-

session and ouster, which demand was opposed by plaintiff on the ground that the case was a proceeding in equity, and on that ground, the Court refused a jury.

In reversing the case and holding with appellant on the point that the Court erred in denying his demand for a jury, the learned judge says as follows:

“It is quite clear that the Legislature, by the mere device of adding new cases to those of a class to which former equitable remedies were applicable, cannot encroach upon that provision of the State Constitution which says that ‘the right to trial by jury shall be secured to all, and remain inviolate.’ And Section 738 of the Code must not be construed as intending to violate that provision of the constitution, unless such construction be unavoidable. Issues about titles to land, such as those presented by the answer in the case at bar, were triable at law at the time the Constitution was adopted, and therefore either party has the right to have such issues tried by a jury. (*Taber v. Cook*, 15 Mich. 322). And Section 738 need not be construed as attempting to take away that right. The main effect of said section is to give parties the right to compel others, by suit, to litigate and determine controversies in cases where such right did not before exist; but if in such a suit issues arise which are clearly legal and cognizable in a court of law, the code does not take away the right to have such issues tried by a jury. Formerly an action like the one at bar could not have been maintained at all; plaintiff would have been compelled to wait until the defendant chose to disturb his possession by an ac-

tion. The Code enabled one in his position to commence the legal contest; but when he thus brings a defendant into court he must be prepared to meet any pertinent issues which the latter may tender, and to try them in the way in which the defendant has the right under the constitution to have them tried. * * *

“But it is clear that the right to a jury trial cannot be avoided by merely calling an action equitable. If that were so, the legislature by providing new remedies and new kinds of judgments and decrees in form equitable, could in all cases dispense with juries, and thus entirely defeat the constitutional provision on the subject. * * *

“In the case at bar, according to the verified answer, defendant was entitled to possession, and was in the possession of the disputed premises a short time before the commencement of the action, and was ousted by plaintiff. If, under these circumstances, defendant had commenced an action against plaintiff to recover possession, it would have been conceded by all that either party would have been entitled to a jury trial. But it is equally clear that plaintiff, by first bringing suit, and thus inverting the parties, could not deprive defendant of his right to a jury. If it were not for the provision of the code, plaintiff would have been compelled to wait until defendant commenced his action, and then there would have been no question about the right to a jury; but while the Legislature had the power to grant the plaintiff the privilege of himself commencing the suit, it had not the power to give him, and we think did not intend to give him the privilege of thus depriving defendant of his constitutional right. * * *

“It is decided here only that where the answer shows that the defendant was rightfully

in possession, and was ousted by plaintiff and wrongfully kept out of possession, upon the trial of those issues, the defendant is entitled to a jury trial."

The learned Court who tried the case below is entirely mistaken in supposing that the above case has ever been overruled or in any way modified by the Supreme Court of the State of California, but upon the other hand, it has been repeatedly affirmed in principle.

We cite next the case of

Newman v. Duane, 89 Cal. 598.

In this case very significant language is used by the Court as follows:

"The plaintiff in his complaint merely alleges that he is the owner in fee 'and in possession' of certain described lands; and that defendant without any right whatever, claims an interest or estate in said land adverse to plaintiff. The complaint, as to the real issues between the parties, is quite childlike and bland and does not contain any intimation that defendant was in the actual possession of the land, and that what plaintiff mainly wanted was to put defendant out. The prayer does not suggest that plaintiff would like to have a writ of restitution. But the answer denies all the allegations of the complaint, and sets up that defendant has been in possession of the land for more than fifteen years; and the Court finds that he has been thus in possession for at least four years before the commencement of the action. Judgment was rendered for plaintiff, which among other things, decrees that 'plaintiff do have a writ of possession of said

premises as against the defendant and all persons claiming under him'. From the judgment, and from an order denying a new trial, defendant appeals.

"Before the commencement of the trial, defendant duly demanded a trial by jury; 'but the Court refused to grant him the same, on the ground that the case was an equity case, in which he, said defendant, was not entitled to a jury trial as a matter of right'. Defendant duly excepted; and the first point made by appellant is, that the Court erred in refusing his demand for a jury.

"We think that the appellant was clearly entitled to a jury, not only upon the principles discussed and determined in *Donahue v. Meister*, 88 Cal. 121, but in accordance with the specific language of Section 592 of the Code of Civil Procedure, which expressly gives the right to a jury trial 'in actions for the recovery of specific real or personal property'. In the case at bar, where the defendant was in possession, claiming adversely to plaintiff, the obviously proper action to have been brought was what we call an action of ejectment,—that is, an action 'for the recovery of specific real property',—in which case the defendant would have been clearly entitled to a jury. Plaintiff has endeavored to accomplish the same result—that is, the restitution of possession in the form of a statutory action under Section 738 of the Code of Civil Procedure. Assuming that said section contemplates a case where the plaintiff is out of possession, and the defendant in possession, still it is evident that the plaintiff herein, by simply framing his complaint in a particular way, could not deprive the defendant of a jury trial of the issues raised by his answer."

The case is again followed by the decision in
Gillespie v. Gouly, 120 Cal. 515.

We quote from the opinion as follows:

“This action may be said to be one of those statutory actions authorized by Section 738 of the Code of Civil Procedure. It is an action brought to quiet title by a party out of possession against one claiming title and in possession. In such an action either party is entitled to a jury as a matter of right. (*Donahue v. Meister*, 88 Cal. 121; 22 Am. St. Rep. 283; *Newman v. Duane*, 89 Cal. 597; *Hughes v. Dunlap*, 91 Cal. 385; *Taylor v. Ford*, 92 Cal. 419; *Landregan v. Peppin*, 94 Cal. 465.)

We cite also the case of

McNeil v. Morgan, 157 Cal. 373,

where there is another express affirmance of the *Donahue v. Meister* case, and we quote from the case as follows:

“For example, it has been held that such a party is bound by depositions taken prior to his intervention (*Rainbolt v. March*, 52 Tex. 246) but the right of trial by jury being a very important privilege preserved by our constitution we would be loath to extend the rule in such manner as to deprive an intervenor of a trial upon matters of fact by a jury where he would enjoy the right to such manner of trial in an action commenced by him originally.”

The facts in this case show clearly that the defendant in his pleading admitted the possession of plaintiff and did not allege possession in himself.

The case of

Davis v. Judson, 159 Cal. 123,

also contains an implied affirmance of the doctrine of Donahue v. Meister, and in the case we find this very significant language:

“Whether an action involves legal issues, or issues of equitable cognizance, must depend upon the facts alleged in the particular case and when the facts alleged here and the issues raised are considered, it is apparent that they are strictly of an equitable nature. None of the parties to the action alleged any actual possession of the lots in question or seek to be awarded possession.”

Berleigh v. Hecht et al., 117 N. W. 367
(South Dakota 1908).

SYLLABUS: Notwithstanding that Rev. Code Civ. Proc., Section 675, providing that an action may be brought by any person against another who claims an estate or interest in real property adverse to him, embraces both the former action of ejectment and the action to quiet title, an action thereunder cannot be said to be a legal or equitable action independently of the pleadings and when plaintiff claims to own the property, and defendant is in possession, and plaintiffs seek to recover said possession as well as to determine defendants' adverse claims, the action is a legal one, and the parties are entitled to a jury trial under Section 244, providing that an issue of fact for the recovery of specific real property must be tried by a jury, unless a jury trial be waived as provided in Section 275.

Seliner v. McKay, 2 Alaska 564.

SYLLABUS: In an action to quiet title, the defendant answered that plaintiff shortly before the commencement of the action ousted him from the rightful possession of the land in controversy, and wrongfully kept him out of the possession thereof. These allegations were put in issue by the reply. The defendant moved to have those issues tried by a jury. Held, on authority of *Donahue v. Meister* (Cal.) 25 Pac. 1096, that the issues of title, ouster, and damages thus raised by the pleadings should be referred to a jury for trial, under Section 371, Code of Civil Procedure of Alaska relating to trials of issues by jury in actions of an equitable nature.

Gage v. Ewing, 107 Ill. 11.

SYLLABUS: Laws 1871, Section 50, providing that Courts of Chancery 'may hear and determine bills to quiet title and to remove clouds from title of real estate', do not interfere with the constitutional right of trial by jury, as the Court has power to submit issues of fact to a jury.

Carlson et al. v. Sullivan, et al., 146 Federal Reporter 476.

We quote from the opinion at page 479 as follows:

"We are of the opinion that, under the provisions of the Seventh Amendment of the Constitution of the United States, a party in possession of real estate, claiming the whole title is entitled to a right of trial by jury, and that

this rule is settled by the decisions of the Supreme Court.

Whitehead v. Shattuck, 138 U. S. 146, 151;
11 Sup. Ct. 276; 34 L. Ed. 873;

Scott v. Neely, 140 U. S. 106, 109; 11 Sup.
Ct. 712, 35 L. Ed. 358;

Lacassagne v. Chapuis, 144 U. S. 119; 12 Sup.
Ct. 659, 36 L. Ed. 368.

It is contended by appellants, however, that the right of trial by jury is not a fundamental right and that the Seventh Amendment to the Constitution has no application to territorial legislation, nor to the jurisdiction of the Courts thereunder, and that the Federal Courts will not decline equity jurisdiction simply because legal questions are involved when the action is brought under a state or territorial statute, and not under the general equity powers of the Court; and numerous authorities are in support of these propositions.

That the constitution of the U. S. applies to Alaska is settled by the reasoning of the decision of the Court in Rasmussen v. U. S., 197 U. S. 516, 525; 25 Sup. Ct. 514, 49 L. Ed. 862 et seq. In that case the Court refers to Black v. Jackson, 177 U. S. 349, 363, 20 Sup. Ct. 648, 44 L. Ed. 801, where the Court, in speaking of law of the territory of Oklahoma and of the contention of appellant, said: * * *

It was contended by the Judge of the lower Court that Forderer v. Schmidt et al., 146 Federal Reporter 480, in some way changes the doctrine of the above cited case but we are of the opinion that this case simply accentuates the principle for which we are contending. The facts show that the action was brought by the plaintiff against the defendant for

the partition of a certain mining claim in Alaska. The defendant admitted ownership of a half interest of the claim in the plaintiff, but alleged that the defendant had forfeited the plaintiff out by proceedings provided under the law. The answer also prayed that if the plaintiff should be held to be the owner, the defendant was entitled to have charged against the claim as a lien upon any interest which may be adjudged to be the plaintiff's, certain expenditures made by defendant in working the property and making improvements thereon.

Under this state of facts, the syllabus clearly and correctly states the law as follows:

Where plaintiff brought suit for partition of a mining claim alleging ownership in common with defendants of the property in controversy, and defendant's answer expressly conceded plaintiff's original ownership of an undivided one-half of the claim and only sought to defeat that ownership by alleging forfeiture by plaintiff's failure to contribute to the performance of assessment work, the action was properly triable in equity under Civ. Code Proc. Alaska C. 43, 397, 398, 403, providing for the partition of lands, and it was therefore error for the Court to dismiss the cause and remit plaintiff to his action in ejectment.

Gilbertson v. Cook et al., 124 Fed. Reporter 986.

The facts in this case show that the issue involved title to a mining claim. The action was one brought in equity by plaintiff against defendant, and the question sharply presented is as to whether

a Court of equity has jurisdiction, in view of the condition of the pleadings.

We quote from the opinion in the case:

“The bill alleges that the plaintiff is in actual possession of the property; the answer denies it. Can a Court of Chancery under Federal procedure, take jurisdiction of such a case? The answer must be in the negative. The reason is plain. Section 723 of the revised Statutes of the U. S. (U. S. Comp. St. 1901, p. 583) provides:

“Suits in equity shall not be sustained in either of the Courts of the U. S. in any case where a plain, adequate and complete remedy may be had at law’. If the complainant is out of possession, and the defendants are in possession, ejectment will lie, which is a complete remedy; and if neither party is in possession, a bill in equity will not lie, under the English Chancery practice to quiet the title.”

Davidson et al. v. Calkins et al., 92 Federal Reporter 230.

SYLLABUS: A Federal Court is without jurisdiction of a suit in equity to determine or quiet the title to real estate of which defendant is in possession though such a suit is authorized by the statute of the State, as the effect would be to draw into a Court of equity a controversy properly cognizable at law.

Cosmos Exploration Co. et al. v. Gray Eagle Oil Company et al., 112 Fed. Reporter 4.

SYLLABUS:. A Federal Court of equity is without jurisdiction of a suit to determine the title or right of possession to lands brought by one who is out of possession against a claimant

in possession and averments in a bill that defendant has drilled oil wells on the land, and is taking oil therefrom, against which an injunction is prayed, are in effect, averments that defendant is in possession, and render the bill subject to demurrer as in purpose and effect, an ejectment bill.

Johnston v. Corson Gold Mining Company
et al., 157 Fed. Rep. 145.

This case comes from Alaska and involves the right of one holding a lease the term of which, was to begin in futuro, to bring an equitable action and to give the Court equitable jurisdiction, by simply praying for an injunction to prevent waste and an accounting and the cancellation of instruments alleged to constitute a cloud upon the title.

It was held

“that inasmuch as plaintiff has a complete remedy at law, his position invoking the general equity powers of the Court cannot be upheld” (page 154 of the opinion).

The reason for this rule is that

“where there is a legal title, and one who holds it is kept out of possession by defendants holding adversely, the remedy is at law to recover possession” (page 149 of opinion).

We have examined the Oregon cases cited by the learned Court below upon pages 14 and 15 in the Transcript, and we call particular attention to the fact that the right to a jury trial does not seem to have been involved in any of the cases.

In the cases cited by us from California the right to a jury trial upon motion made in a preliminary way, was directly involved.

We have cited from many cases to show how zealous the Courts are, in preserving the distinction between legal and equitable actions involving the right to possession to and title of real property. How much the more zealous should the Courts be when the motion for a jury trial was made in due time, and where the motion was denied even though it was practically conceded that defendants were in possession of the property, and therefore the right to possession was the paramount question in the case?

We also call special attention to the fact that most of the cases cited by us are mining cases involving claims where the possessory right is the paramount question, because mining claims as a species of real property are soon exhausted of their values, and therefore possession is usually tantamount to ownership.

We are constrained to say that the case of *Maddern v. McKenzie*, 144 Fed. Reporter 64 (Alaska 1906) holds only in effect that a motion should be made to transfer the case to the law side of the Court. The decision in that case was based upon a proposed change in a lease by an oral agreement and the right to a trial by jury was not directly involved.

We submit that the best test which could be applied in the solution of any contested question of this character would be an answer to the question, Is either the plaintiff or the defendant entitled *prima facie* to a jury trial upon the questions at issue?

We have reserved the case of *Angus v. Craven*, 132 Cal. 691, for consideration as the last case amongst the California cases, because the learned Court below seemed to be of the opinion that

“in the case of *Angus v. Craven*, 64 Pacific Reporter 1091, the Supreme Court of California arrives at a different conclusion from that of *Donahue v. Meister*, *supra*, and in effect overrules it” (Trans. p. 17).

Upon the other hand we assert very confidently that this case affirms the doctrine and reasoning of *Donahue v. Meister* and illustrates clearly the distinction between a case like *Angus v. Craven* and a case like the case at bar.

In *Angus v. Craven* the action was brought under Section 738 of the Code of Civil Procedure of the State of California and possession was alleged in the plaintiff. *The answer admitted plaintiff's possession and did not show any prior possession in defendant*, which facts are clearly called attention to in the opinion itself.

We quote from page 697 of the opinion upon this point:

“A complaint showing that plaintiff is the owner of the land, and in actual possession of it,

and that defendant asserts some right or title thereto which is unfounded, followed by an answer admitting plaintiff's possession, and *not showing prior possession in defendant* seems to present the very action contemplated by the code provision; and under these conditions, its continued equitable character is not affected by the particular kind of right which the defendant sets up. Therefore, if we are to consider the case at bar solely in the light of an action to quiet title under Section 738, we do not think that, under the conditions above stated, the Court below erred in denying appellant's demand for a jury."

It is further pointed out that the action brought in this case was one to have a certain deed, which was asserted by defendant to be a valid conveyance of the property involved in the action, set aside as is shown by the following language:

"Now in the case at bar the facts averred in respondent's pleadings entitled them to relief under Section 3412 and to have the alleged forged deeds to be declared to be such, and be cancelled."

It therefore appears from this case clearly that the question of the possession of the defendant is an exceedingly important one, and if defendant had alleged possession of the property and had demanded a jury trial, we may well believe that the denial of such a demand would have been considered serious error, and to sustain our position in this regard, we quote the following language from the decision in the case:

"Courts, however, in guarding the constitutional right to a jury trial, have repeatedly held

that where the suit should have been, and in substance is, an action for the recovery of the possession of land, the right of a defendant to a jury cannot be defeated by the mere device of bringing the action in an equitable form. And so it has been held that the right to a jury cannot be defeated by the mere device of bringing the action in an equitable form. And so it has been held that the right to a jury is not defeated, where, at the commencement of the action, the defendant, and not the plaintiff, was in the actual possession of the premises involved; and it has also been held that where the defendant had been for a long time in the actual possession, and the plaintiff had ousted him, the plaintiff by first bringing his action to quiet title, could not by such inversion of parties, avoid the defendant's right to a jury, but that the action should be treated as substantially an action to recover possession. But this is as far as this Court has gone in *Donahue v. Meister*, 88 Cal. 121; *Newman v. Duane*, 89 Cal. 597; *Gillespie v. Gouly*, 120 Cal. 515; *Moore v. Copp*, 119 Cal. 434, and kindred cases. As was substantially said in *Donahue v. Meister*, *supra*, the decision of the question whether, in an action brought under Section 738, either party is entitled to a jury must depend greatly upon the facts in that particular case. It has never been held by this Court that an action to quiet title under the code cannot be maintained as an equitable action, where the plaintiff was, and for a considerable period of time had been, in actual possession, and defendant had never been in possession, or that in such case a defendant can overthrow the equitable character of the action by simply answering that he has title, and praying that he for the first time be let into possession."

But even if we assume that we are mistaken on this branch of the argument and that defendants were not entitled by the facts presented on their motion to a jury trial as of right, still we think then we have at least demonstrated that upon the showing made, the defendants should have been permitted to submit certain issues of fact to a jury.

It is rather a serious matter in any event as we have shown from the opinions of many learned judges, to deprive a party of a trial by jury upon such an important question as the ultimate right to the possession and ownership of a mining claim. But if we are to concede that the right to a jury trial may be taken away, even in an action which in its essence is brought for the purpose of determining the right of possession to a mining claim, still where there is any doubt upon the law of the question, it would seem that the chancellor ought to resolve that doubt in favor of the constitutional right to a trial by jury, at least to the extent of submitting special issues of fact to a jury when solicited by the defendants so to do. We must remember that the right to a mining claim is in its essence a possessory right, especially where no patent has been secured from the United States Government.

In the case at bar no patent was secured by either the plaintiff or the defendants, and the issue being one involving primarily the right of possession of a portion of the open lands of the United States, it would seem to be in accordance with the broadest principles of justice to have granted de-

fendants' motion that they might submit special questions of fact to the jury.

Section 371, C. C. P. of Alaska, reads as follows:

“The provisions of chapter fifteen of this title shall apply to actions of an equitable nature except as in this chapter otherwise or specially provided. Both issues of law and fact shall be tried by the Court, unless referred. Whenever it becomes necessary or proper to inquire of any fact by the verdict of a jury, the Court may direct a statement thereof, and that a jury be formed to inquire of the same. The statement shall be tried as an issue of fact in an action and the verdict may be read as evidence on the trial of the action.”

Carter's Annotated Alaska Codes, p. 226,
Sec. 371.

We readily concede and there need be no authority cited upon the point by appellee, that it was within the discretion of the trial Court either to submit questions of fact to a jury or not, but we submit that this discretion should be a reasonable one, exercised with due regard to the rights of all the parties to the litigation. The statute is peculiar in that it says “whenever it becomes necessary or “proper to inquire of any fact by the verdict of a “jury”.

In view of the fact that the defendants allege possession in themselves in their verified answer and that upon the motion made, the defendant, McCumber, in an affidavit alleges specifically possession in himself as lessee of the ground; and in view of the fact that no counter showing was made

upon the motion, we submit that a clear case of abuse of discretion is shown and that the denial of the right of the defendants to have the question of possession and ownership of the ground submitted to a jury, was such an abuse of discretion as to arise to the dignity of a serious error.

We confess frankly that we are at a loss to understand why the case at bar should have been tried along such narrow and confined lines, and no record can disclose a better illustration of how a narrow trial may prejudice the rights of the parties litigant than the order of the Court in the case at bar denying the motion to submit questions of fact to a jury, coupled with the denial of the motion of defendants to have the case tried by a jury in the first instance.

II.

DEFENDANTS' MOTION FOR A CONTINUANCE OF THE TRIAL OF THE ACTION FOR THE PURPOSE OF RETAKING THE DEPOSITION OF ANDREW JENSEN SHOULD HAVE BEEN GRANTED UNDER ALL THE PECULIAR FACTS AND CIRCUMSTANCES OF THE CASE.

This contention is based upon defendants' proposed bill of exceptions No. 2, which is found on pages 121 to 153 of the transcript.

The objection is specifically made by Assignment of Error No. 3 (Trans. p. 173).

The facts in this regard are as follows:

Andrew Jensen resides in Buffalo, North Dakota, a long distance from the place of trial, and was not in fact present as a witness at the trial.

The affidavit of M. D. McCumber, one of the defendants, shows in substance that after the bringing of the action in November, 1910, he interviewed Tom D. Jensen, who was the son of Andrew Jensen, the original locator of the Moonlight Bench Placer Claim. Andrew Jensen was not only the locator of the said claim, but his name also appeared as a witness to the Grant Location (Trans. p. 228), under which the defendants claim.

At the request of McCumber, Tom Jensen wrote to his father two letters, one of which, Exhibit "A", was attached to the affidavit and is found in the transcript on pages 132 and 133 thereof.

The said Tom Jensen also sent a blue print accompanying his letter, which affiant states was very similar to the one actually used by the plaintiff in the cross-examination of the witness, Andrew Jensen. In reply to the letter of Tom Jensen, his father stated in substance that the claim which he located was "bounded on the end by the Upper "Half of Lindblom's Moonlight Claim" (Trans. p. 125).

In a second letter written by Andrew Jensen to his son, he states, in substance, that he struck Lyng's Claim on Moonlight and then followed up the Moonlight Claim again along the upper end and

that Grant's location stake was set at the upper end of the Moonlight Claim (Trans. p. 126).

Affiant further states in substance that accompanying the letter first written by said Andrew Jensen, he mailed to his son a map showing the position of the claim which he staked as being between Moonlight Claim and Little Creek as claimed by the defendants. That the defendants relied upon this information given to them by Tom Jensen and got out a commission to take the deposition of Andrew Jensen at Fargo, North Dakota, and propounded direct interrogatories to said witness to prove the facts as stated in the said letters and map.

That the defendants tried to get the said Andrew Jensen to come to Nome, and offered to pay his expenses, but failed in that behalf. That when the deposition of the said Andrew Jensen was in fact taken, he contradicted all the material statements contained in his letters upon which defendants relied. That affiant believed the statement of the said Andrew Jensen to be true and had every reason to believe that he would so testify. That affiant has caused a notice of the retaking of the said Andrew Jensen's deposition to be served accompanied by interrogatories which call attention of the said witness to the telegram which he sent to his son and which lays the foundation for impeachment of his statements, if he shall persist in denying the statements made in the letters and telegram; but upon the other hand, if he admits the statements to be true, then the same can be used as evidence in the

case. That affiant desires the case to be continued until the Spring Equity Term of the Court, so that the said deposition may be taken, and so that the defendants may prove by the witness that he wrote the letters and sent the telegram.

Affiant alleges that he expects to prove by the said witness that he talked to other and different persons on behalf of the Pioneer Mining Company, the plaintiff in the suit, and that he received the sum of \$1200 at Buffalo, North Dakota, from the plaintiff.

Affiant will also show that the said witness Andrew Jensen drew a map of his own to locate his said claim with a blue print of the Gibson survey before him, and if he shall deny such to be a fact, the affiant will produce said map.

Affiant states that he was advised by his attorneys that the only way that said letters, telegram or map or drawing made by said Andrew Jensen, can be used at the trial of said action is by exhibiting the same to the said Andrew Jensen for identification, admission or denial.

Affiant further states that William Grant locator of the Grant Claim, has long since been dead and that defendants have no other way of denying, refuting and impeaching the statement of the said Andrew Jensen other than by showing the same to be utterly and absolutely false by his own prior statements, telegram and drawing.

Twenty-nine proposed interrogatories are found on pages 138 to 148 of the transcript which show that the defendants in good faith wished to examine the witness Andrew Jensen concerning letters written by him and a certain telegram sent to his son.

The letter Exhibit "A" found on pages 132 and 133 of the transcript and the answer thereto from which affiant quotes in his affidavit, show clearly that if the facts are as stated in said affidavit and letters, the testimony proposed to be adduced was of the greatest importance to the defendants.

We concede that the lower Court was clothed with discretion to deny the motion for a continuance, but we most respectfully suggest that the discretion herein referred to must be a reasonable one and not in any sense arbitrary. While we have for the Judge of the Court below the most profound respect, we are at a loss to understand why the strong showing for a continuance made upon the affidavit, letters and telegram should not have been granted, with a view to doing substantial justice between the parties.

We call particular attention to the fact that no counter showing whatever was made by plaintiff by affidavit or otherwise. So far as the facts are concerned we think it a fair inference (at least for the sake of argument) to assume that the facts as stated in the affidavit of the witness, McCumber were and are true. It is true therefore that if the deposition of Andrew Jensen had been re-taken, he

would either have confessed to an error in the statements made by him in his deposition, or he would have been compelled to admit that he was telling a deliberate untruth in the statements made by him to his son in the letters and telegram.

It is rather a serious situation when we find the defendant McCumber willing to say upon his oath that he expected to prove, and that he would prove that the plaintiffs had paid Andrew Jensen the witness, the sum of \$1200 at Buffalo, North Dakota; nor are we confined to the statement of the defendant, because a telegram is produced purporting to have been sent to Tom Jensen by his father in which this same \$1200 figures rather conspicuously.

The question as to the exact location of Jensen's claim was one of great importance in the case, as we shall see later on in the argument. If the statements contained in the letters and telegram of Andrew Jensen are true, then it appears that his claim did not overlap the Bob Lyng claim but on the other hand lay outside of it.

It will be observed that the decree in the case at bar places the Jensen location overlapping the Bob Lyng claim. It ought to be the wish of the lower Court in view of this serious condition of the testimony to get at the truth, and since the mining claim involved in the case was certainly not deteriorating in value, a continuance until the opening of navigation would certainly seem to have been a most reasonable request.

Here we have a situation where the most important and pivotal witness of the case resides outside of the jurisdiction of the Court.

In any event it is a most difficult thing to frame interrogatories in such a way as to secure the truth from a witness who is influenced (if such be the fact) to any extent in the direction of not telling the truth, freely and openly. If subjected to oral cross-examination at the trial, the truth may be dragged out of a hostile witness, despite any leaning which he may have to either one side or other of the controversy.

It appears from the affidavit of McCumber and this statement must be considered as true on the hearing of the motion, that the other important witness, Grant, was dead. Jensen, the most important living witness, is testifying through the unsatisfactory medium of a deposition.

So long as there was the slightest doubt as to the fairness of that examination, we submit that a continuance should have been granted in order that the defendants might make the fullest examination of the witness possible.

The defendants were brought into Court in the case at bar to defend their title to a mining location upon which they had expended money and time. It would have been entirely within the scope of a broad conception of equity and justice, to have allowed them every possible means to bring the

truth to the defense of their title and possession to the claim.

The Court will take judicial notice of the climate conditions in Nome, where the lower Court sat at the trial of this case and will bear in mind the fact that the close of navigation makes the procuring of testimony in a case of this kind exceedingly difficult.

The chronology of events so far as this motion is concerned is also interesting and exceedingly significant.

The complaint in the case was filed on November 7, 1910. Tom Jensen at the solicitation of the defendants wrote the letter to his father December 12, 1910; he telegraphed his father July 15, 1911, and received a reply July 28, 1911. The motion to continue the trial of the action was denied October 27, 1911, and the action proceeded to trial November, 13, 1911. The Court will take judicial notice of the length of time necessary in carrying on correspondence between Nome, Alaska, and Buffalo, North Dakota, and we submit that due diligence is shown in a convincing manner by the succession of events preceding the trial of the action.

We repeat in conclusion on this branch of our argument that in view of the fact that absolutely no counter showing was made by plaintiff, we are at a loss to understand why defendants, brought into Court to sustain their title to ground of which they had actual physical possession, should not have been granted the greatest latitude possible in se-

curing the testimony of such an important witness as Andrew Jensen.

We cannot affirm positively that Andrew Jensen does not speak the truth in his deposition, but if he wrote the letters and sent the telegram and received the money as shown in the affidavit of one of the defendants, then surely we have a right to conclude either that great suspicion rests upon the truth of his statements, or at least defendants should have been given the right to remove that suspicion by a further examination of the witness.

If Andrew Jensen had been living within the reach of the processes of the Court below and through negligence of the defendants, he had not been produced in time for the trial, we could find it possible to say that litigation ought not to be delayed, because of the negligence of litigants in procuring their evidence. But when a litigant is burdened with the handicap of not being able to produce a witness in person, and where great doubt exists as to whether a witness is telling the truth in a deposition which he has already given, surely the request to have the deposition retaken, especially where counsel was confined to the narrow limits of interrogatories, is not such a request as would seem to have been made for the purpose of securing delay in the trial of the action. And in this behalf we call particular attention to the lack of any affidavits whatever filed by the plaintiff showing how in any manner he could have been in-

convenienced to the slightest extent by delay in the time of trial of the action; nor is it suggested in any way how the property involved in the controversy could deteriorate in value, if continuance of the trial of the action had been granted.

We submit therefore that the denial of the motion for a continuance under the peculiar facts and circumstances of this case was such an abuse of discretion that the action of the Court was highly prejudicial to the rights of defendants.

III.

THE MOTION FOR A CHANGE OF THE TRIAL JUDGE IN THE ACTION AT BAR SHOULD HAVE BEEN GRANTED UNDER THE PECULIAR FACTS AND CIRCUMSTANCES OF THE CASE.

This proposition is based upon the third bill of exceptions, and the record in support of the motion is found in the transcript from pages 153 to 162, and the alleged error is assigned in Assignment of Errors No. 4 (Trans. pp. 173, 174).

This motion is based upon section 5, part 3, Chap. 1, of the Alaska Political Code (Carter's Code, p. 133) and proceeds upon the theory that the learned Judge of the Court below was disqualified from acting by reason of prejudice against the defendants and in favor of the plaintiff, to such an extent that the defendants in good faith had reason to be-

lieve that an impartial trial could not be had before the said Judge.

An affidavit accompanies the motion made by McCumber, one of the defendants, in which specifically there is set forth a resume of all the motions heretofore in this brief referred to.

Affiant then proceeds to state that he believes that the Judge of the lower Court is biased through friendship in favor of the plaintiff, the Pioneer Mining Company as against the said defendants, and that by reason of said bias and prejudice, said Judge refused to grant defendants a jury trial on the issues of fact prayed for and also refused to grant a continuance of the trial of said action for a reasonable time and that affiant believes that defendants cannot have a fair and impartial trial before said Judge, because of his said bias and prejudice.

It is clearly shown in the affidavit of Elwood Bruner in support of said motion that another Judge would sit at Nome for the hearing of certain specified cases and that the case at bar could be heard. No counter showing is made to this motion by the plaintiff and no facts are presented by affidavit or otherwise in opposition to the facts set forth in the affidavit of the defendant, McCumber, but a purely technical attack is made upon said motion.

The first point of attack is in the nature of a demurrer, the contention being that the said appli-

cation of the defendants does not state facts sufficient to authorize the Court to change the venue of said action, or to call in another Judge to try said case.

The defendant McCumber alleges directly in his affidavit that the Judge of the lower Court is biased because of his friendship for the Pioneer Mining Company, and then facts are set forth showing that the Court upon two specific motions, has employed his discretion entirely against the defendants.

We readily concede that the affidavit of the defendant, McCumber is not so specific in the statement of the acts constituting the prejudice and bias of the lower Court as it might have been, but we are astonished to find that when an affidavit is filed alleging friendship as a ground of bias and other acts which may indicate bias, that no counter-showing whatever is considered necessary, but that plaintiff may simply waive its hand and end the discussion.

We must remember that no reason was given for the denial of the motion for a continuance of the trial. No reason was given for the denial of the motion to submit special issues of fact to a jury. We do not intend to suggest that we consider it necessary for the Judge of the lower Court to give a reason for rulings made, but we do think that the plaintiff should have supplied some facts which would tend to negative the belief, which the de-

fendant, McCumber had as to the bias and prejudice of the lower Court.

It might well be argued that in any event and upon any showing whatsoever which might be made, the defendant McCumber's idea that the Judge was biased against him was all a matter of opinion, but in view of the fact that the learned Judge of the Court was himself passing upon the question of his own bias and prejudice, we must respectfully submit that it would have been better for the plaintiff to have made a counter showing rather than to have depended entirely upon a purely technical attack upon the case made out by the defendants.

The plaintiff charges that the motion was made to delay the trial of the action and that it was not made in good faith. We may well complain that these statements are made by counsel for the plaintiff and are based upon no facts whatever in the record. We do not apprehend that the statements and conclusions of counsel on a motion of this character can take the place of evidence. The affidavit of Mr. Bruner clearly shows that another Judge would appear in the district who could try the case and the mere statement, not under oath, of the attorneys for the plaintiff, would not seem to be sufficient to meet that statement of facts, made clearly and specifically.

We submit, therefore, and again we say that we argue this point with all due and proper respect

for the Judge of the Court below (a respect which is based upon personal acquaintance and friendship with said Judge), that it would have been more in accord with real justice to defendants in view of what had gone before, if this motion had been granted, and we believe that the failure to grant the motion was a clear abuse of discretion under all the facts and circumstances of the case.

IV.

THE OPEN, NOTORIOUS, UNINTERRUPTED, ADVERSE POSSESSION BY DEFENDANTS AND THEIR PREDECESSORS IN INTEREST OF THE CLAIM AT BAR UNDER COLOR AND CLAIM OF TITLE FOR A PERIOD OF OVER TEN YEARS IS CONCLUSIVELY PRESUMED TO GIVE TITLE TO DEFENDANTS, AS AGAINST PLAINTIFF EVEN THOUGH DURING THE ENTIRE PRESCRIPTIVE PERIOD DEFENDANTS HELD POSSESSION OF THE CLAIM IN SUBORDINATION TO THE PARAMOUNT TITLE OF THE UNITED STATES GOVERNMENT.

Under this head of our argument we shall include and discuss assignments of Errors Nos. 18, 19, 20, 21, 22, 24, 25, 26, 27, 28, 35, 48, 49, 59, 60, 63, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74 and 75.

The question of law involved in all these Assignments of Error is as follows: *Can an absolute possessory title be acquired by prescription, to unpatented public mineral lands, good as against either a prior or a subsequent locator?*

The question of fact involved is as follows: *Does the evidence in the case at bar show beyond serious contradiction that the defendants and their predecessors in interest acquired title to the Grant Claim including the alleged conflict area, by an uninterrupted, adverse, notorious, possession, originating with a claim of title through the Grant Location, and reaching fruition in ten long years of labor, money expenditure and actual physical occupancy?*

We do not ignore the fact that the findings of the lower Court are against defendants as to the facts constituting their possession and the character thereof. But we assert positively that the evidence is clear and uncontradicted in all essential points as to the possession of defendants and the character of their possession. It is not at all difficult to reconcile the findings of the lower Court with the great mass of testimony introduced by defendants (all of which showed defendants' possession and the largest part of which stands uncontradicted) when we know, as appears from the record, that the action was tried by the lower Court upon the theory that no title by adverse possession could be acquired to public lands by one holding possession in obvious subordination to the United States. Since the lower Court believed this to be the proper principle of law applicable to the situation which confronts us in the case at bar, no amount of testimony and indeed no kind of testimony, on the question of possession, would influence the lower Court to find for defendants. It is admitted that the defendants held the

claim in subordination to the title of the United States. Never could they have acquired title as against the Government except through a patent. Never could their prescriptive title ripen into a fee or even into a possessory right as against the United States. The lower Court concluded, therefore, that no title by adverse possession is possible under the facts of the case at bar, and that therefore the findings should be against the defendants.

We contend that this error of law was woven through the entire web and woof of the case, and that defendants were deprived of a valuable property because of this serious misconception. We are not depending on surmise or speculation in this regard but fortunately we can point to the opinion of the learned Court below rendered in giving his decision, which shows the error of law involved (Trans. pp. 104, 109). Perhaps it is not amiss to say that the lower Court considered the principle of law which he was applying to the decision a doubtful one because he said "it is the wish of the "Court that defendants appeal their case to the "proper tribunal to correct any errors that may "have occurred during the trial" (Trans. p. 109). Since it is not the function of the appellate Court to determine disputed questions of fact, and since a large part of the errors assigned involve directly and indirectly this principle of law, we think we are correct in saying that this remark applies particularly to the question involved under this head of our argument, which question seemed a close one

to the learned Court. We shall divide our argument upon this subject into two parts:

- (a) The evidence clearly shows adverse possession in defendants for the statutory period, and (b) Defendants' title by prescription is established as a legal conclusion from the facts proved.

(a)

**THE EVIDENCE CLEARLY SHOWS ADVERSE POSSESSION IN
DEFENDANTS FOR THE STATUTORY PERIOD.**

A. G. KINGSBURY.

(Trans. pages 428-490.)

“The stakes and mounds of the Grant Claim as marked on the ground at the time of trial are the same as they were in the last of July or August, 1899, when I first saw the claim. The corners and initial stakes of the Grant Claim were at that time plainly visible. I was there with Mr. Grant in July or August, 1899, and there were no markings or monuments of any kind within the boundaries of the Grant Claim.

“Mr. Grant showed me where he had been working on the claim. I took an option on the ground, gold was found within the boundaries of the claim.

“Later in August, 1899, I took a second option. I organized or assisted in the organization of the Corwin Trading Company. I was their agent and in full charge of their affairs. I was on the Grant Claim in the spring of 1900. I inspected the bound-

aries and corners and the initial stake was still standing in the same places as they now stand. In 1900 I did quite a little prospecting and worked the southern end of the claim for the Corwin Trading Company. One of my men, Coney Weston, on the lower half of the claim drove a shaft say ten (10) feet, and then he dug north about the same depth. When I speak of the lower half of the claim, I mean the half upon which the initial stake was set toward the southwest corner of the claim. I know that part of the work done by Coney Weston was on the part of the claim in controversy. There never was any other person but him and my men in the physical possession of the Grant Claim or the ground within the boundaries of the Grant Claim in 1900, nor was there any markings or stakes or monuments within the exterior boundaries of the Grant Claim in 1900 to my knowledge, and I frequently rode by the claim in 1900.

“I was the manager or agent of the Pacific Coal & Transportation Company 1901, and this corporation was organized in that year to take over the properties of the Corwin Trading Company. I was on the claim in 1901 a great many times and the corporation was in the possession of the claim in that year. Quite a little prospecting was done under my direction. Work was done by A. D. Rogers and Mike Leary, and they sunk a shaft north of the work done by C. Weston. The shaft was fourteen (14) feet deep and they also dug a trench in the hill running northwest and southeast. The stakes of

the Grant Claim were standing during that year the same as they were pointed out to me by Grant in 1899. I made larger mounds around the stakes in that year, sod mounds. I put a good-sized mound around the initial stake and the shaft dug in 1901 must have been within the ground in controversy.

“In 1901 I also filed an amended location of the claim.”

(NOTE. The Court at this point sustained an objection to the witness testifying as to whether any person was in the physical possession or claimed the physical possession of any of the Grant Claim in 1901.)

“I was on the Grant Claim in the summer of 1902 a great many times and was the agent of the Pacific Coal & Transportation Company and in charge of its affairs at Nome. The work done in 1902 consisted of digging around the lower part of the claim. Some of the work was inside the limits of the ground in controversy, and some of it was north. I put some new stakes out in 1902. I took some jumper stakes out and threw them away.

“The photographs which you show me, defendants’ Exhibits 17, 18, 19, 20 and 21, are photographs of the stakes of the Grant Claim replaced by me on the claim in 1902. The photograph which you show me, Exhibit ‘22’, is a picture of the cabin on the Grant Claim. It is on the south part above the railroad. The picture which you show me, defendants’ Exhibit ‘23’, is a shaft near the southwest corner and within the ground in controversy. It also

shows the Bard and Muther tailings. These are the tailings from the work done on the claim in 1904-1905, which work was within the ground in controversy.

“The picture which you show me, defendants’ Exhibit ‘24’, shows the tailings on the south half of the claim. It is a picture of the ground in controversy and shows piles of rock or tailings of the work of Bard and Muther and the Russians. These people were laymen under the Grant title.

“I gave Pat Winter and George Crawford a lease of the Grant Claim on behalf of the Pacific Coal & Transportation Company in 1902. The lessees took possession of the Grant Claim and worked near the southwest line of the claim within the ground in controversy. I caused the claim to be surveyed in 1902 by Mr. Arthur Gibson, and he furnished me with a blue-print of the survey. He surveyed it with reference to the mounds I identified, the same mounds as shown in the photographs. There was several hundred dollars of work done on the claim in 1900 and 1901 according to the current amount of wages and there was more work done in 1901 than in 1900.

“Miss E. L. Howard was the agent of the company in 1903. I crossed the claim in 1905 nearly every day and saw the initial stake and the corners still in the places as when I first saw them. I was on the claim in 1906 and 1907 and observed the work

being done on the claim by Bard and Muther. They were working on the southwest end very near the initial stake, sinking shafts and tunneling and taking out a dump of pay gravel and they sluiced during the summer. Their work was on that portion of the ground in controversy. I saw the Russians working in 1905. I executed a lease in the fall of 1902 to Howard and Doverspike. They worked on the claim in 1902 and 1903 and took out dumps on the southwest end within the ground in controversy. There could not have been less than \$5000 worth of work done on the Grant Claim from 1900 to 1907 and during that time no one to my knowledge ever made claim to any of the ground except the incident on the jumper stake to which I refer.

“The Pioneer Mining Company and its grantors never made any claim to any portion of the ground to my knowledge, nor did Mr. Andrew Jensen or D. W. McKay. I never in the earlier years heard of any claim known as Moonlight Bench No. 1 or No. 1 Bench on Moonlight, and there were no monuments or markings of any kind which I saw to indicate such a claim. The first time I ever heard of the Pioneer Mining Company claiming a portion of the Grant Claim was at the time they started suit in the fall of 1910. Mr. McCumber was conducting mining operations on the ground in October or November, 1910, and his men were living in the red cabin shown in the photograph.”

ETHEL LUELLA HOWARD.

(Trans. pages 493-504.)

“I know the Grant Claim. I own some mining claims in the vicinity of the Grant Claim, and have owned property in that vicinity since 1900. I passed over the Grant Claim two or three times in the summer of 1900 and I had charge of the property of the Pacific Coal & Transportation Company. I signed as a witness the amended location notice of the Grant Claim about the 4th day of October, 1901. I do the physical work of mining, digging and mining, and I have done that character of work including prospecting for a number of years. I saw the amended location notice on the Grant Claim in 1902 while doing work in that vicinity. The notice was on the initial monument stake of the Grant Claim. I knew the Lyng Claim, and the amended notice that I speak of was at the easterly end of the Lyng Claim. I was left in charge of the property of the Pacific Coal & Transportation Company in the winter of 1902. Howard and Doverspike and their partners performed work on the Grant Claim during the winter of 1903, they were taking out a dump there and did some prospecting. There were four men all of the time working there, and I think they had five men part of the time. They commenced to sluice in the middle of May, 1903, and quit work when the injunction of the Moonlight Springs Water Company was served upon them,

and the dumps were washed up after June, 1903, to my knowledge.”

(NOTE. The Court refused to allow the witness to testify as to the value of the work done on the Grant Claim by Howard, Doverspike and their associates in the winter of 1902 and spring of 1903.)

“While I had charge of the Grant Claim I never heard of any one making any claim to the ground embraced within its boundaries.”

(NOTE. The Court refused to permit the witness to testify as to whether the Pioneer Mining Company, Andrew Jensen, or D. W. McKay or anyone on their behalf made any claim whatsoever to any part of the Grant Claim, although the Pioneer Mining Company was mining on adjoining ground in that vicinity.)

“W. H. Bard succeeded me July, 1903, in the care and attention of the Grant Claim. Mr. Hopkins and his partners were working on the Grant Claim in the fall of 1903 near the place where Howard and Doverspike worked, and the work done by Hopkins was within the ground in controversy. I observed the boundaries of the Grant Claim while I had charge in 1902-1903 and the boundaries were marked. The initial stake had a good-sized sod mound. I saw the stake at the southwest corner, and the stake marked 5 at the northwest corner and the stake marked 4 at the northeast corner and the stake marked 3 on the southerly corner, and I recognized all these stakes as the ones I saw Mr.

Kingsbury paint in the office of the company in October, 1901. I never saw any stake in the vicinity of the northeast corner of the Grant Claim other than the Grant Claim stake prior to the latter part of October, 1902, and I was at the camp out there a great many times and was passing up and down to Moonlight Springs for water."

ROBERT LYNG.

(Trans. pages 504-528.)

"I located the Moonlight Claim in November, 1908. I know a man by the name of Andrew Jensen, and he had a claim near mine. I knew William Grant. His claim was east of mine, and his initial stake was identical with mine and was in the same mound that I had erected.

"I saw Grant in the vicinity of Moonlight Claim. I was on his claim. It extended from my upper end in an easterly or northeasterly direction. Grant was camping and at work on his own claim adjoining the Moonlight in May or June, 1899. He was prospecting. Jensen was also on his claim the day Grant and I were there. I do not know anything about a claim called No. 1 Bench Moonlight in 1899 and I never saw any stakes or monuments of any kind or character indicating where that claim was. The only claim in that vicinity that conflicted in any way with my Moonlight Springs Claim was what was called No. 6 Goodluck, the one that Jensen

was camped on in the summer of 1899. He claimed that the northeast corner of my claim had been moved over on his ground."

(NOTE. The Court refused to permit the witness to testify that no one made any claim to any portion of the witness' claim and especially that the Pioneer Mining Company and none of its predecessors made any such claim.)

FRANCIS M. WARSING.

(Trans. pages 536-547.)

"I know the Grant Claim and got acquainted with it in March, 1902. I was working on the Gaffney Fraction about 400 feet from the southwest corner of the Grant Claim. In the summer of 1902 I observed Mr. Winters and Mr. Crawford working within the Grant Claim boundaries on the western end running an open cut, and they were working on the ground in controversy.

"In the fall of 1902 I observed George Doverspike, Fred Williams, Billy Schue and Mike O'Leary with C. T. Howard working on the Grant Claim. I think that was in September, 1902. They were working on the southwesterly end within the ground in controversy, and they had a cabin there. They were digging shafts. They worked on several shafts. They commenced in 1902 and worked continuously until May, 1903. They hoisted gravel near the shaft. I was at the bottom of their shaft but did not go into their stopes. They took out six dumps.

They took out about 310 or 312 ten-pan buckets in each dump. They did sluicing and actual mining in the spring of 1903 and they quit in the spring of 1903 because an injunction was filed against him. A portion of the dumps was washed up, the balance remained, and the rest of the dumps were washed up in 1903 by Hopkins and Muther. The dumps were visible. I first saw Hopkins and Muther working on the Grant Claim in August, 1903. Hopkins worked about ten (10) days on the southwesterly end of it, near the same place where Howard and Doverspike had worked. When Hopkins quit work, Muther and Bard continued. I lived out there during the month of September and October, 1903, and I was in plain sight, where I was working, of the most of the Grant Claim. There was no one else other than Mr. Hopkins and Mr. Bard working within the boundaries of the Grant Claim at that time. If the Pioneer Mining Company had any men digging in that portion of the claim, I should have seen them from where I was. There was nobody else working on that part of the claim. Muther and Bard were working at that time within 200 feet of the stake, and Muther and Bard in the fall of 1903 were living just past the railroad track, and they lived there all the winter of 1903 and 1904. They were sinking holes there and prospecting and abstracting several small dumps and in the spring of 1904 they sluiced them up. In the summer of 1904 Muther and Hopkins worked on the Grant Claim on the west end about 400 feet from the springs. In

the summer of 1904 I had an option of a lease from Muther on the Grant Claim. I did some work on the Grant Claim prospecting. I sank four holes 19 and 24 feet deep on the southwest part of the Grant Claim within the ground in controversy. I observed further work on the Grant Claim in the fall of 1904 and the spring of 1905.

“The operations were carried on by Oscar Margraf and John Rieck. I never heard of a claim called Bench No. 1 off Moonlight. From February, 1902, until the spring of 1905 I never heard or knew of any conflict between any other claim and the Grant Claim.”

(NOTE. The Court refused to permit Waring to testify that while he was working on the ground under option from Muther no one molested him or interfered with him or claimed that he was working the ground not belonging to defendant.)

“I knew of a tunnel constructed on a portion of the claim in the fall of 1904. I was in the tunnel and they were in about seventy (70) feet. It was bedrock work on the southwest part of the Grant Claim, the part of the claim in controversy. During all the time I was working in that vicinity from February, 1902, until the spring of 1905, I did not see anybody else working in that vicinity other than the men I have named and the laborers that worked for them.

NICHOLAS R. BARGE.

(Trans. pages 547-549.)

"I first knew the Grant Claim in 1901 and 1902 and in the summer or fall of 1901, I observed some men working on the claim. I know where the boundaries of the claim are, because I assisted Surveyor Dan Jones in chaining at the time he surveyed the claim. The men that I saw working there in the fall of 1909 were, I believe, working in the ground in conflict. In 1902 I saw men working on the southwest end of the claim in the same place that the men were working in the fall of 1901. During the winter of 1903 I was upon the Grant Claim lots of times and men were engaged in mining in that portion of the claim. Their work was visible to anyone passing along the surface. I observed Muther and Bard working on the Grant Claim, and I knew the men that were working for them. Muther and Bard had cabins on the Grant Claim and I saw them in 1904. The cabins were a little northeasterly about 400 feet I guess from the southwest corner of the claim and on the ground in controversy. The men were doing work there at the time sinking shafts and taking out dumps. In 1904 and 1905 there was a dump there that was very close to the line as I remember it now.

"In 1905 I was familiar with the Grant Claim and tried to get a lease of it and made an investigation with that in view."

CHARLES OLSON.

(Trans. pages 549-554.)

"I know the Grant Claim and first saw it in 1899. I was in the locality of the initial stake in 1900. In September, 1900, there were two men working on the claim, and one looking on. I was in the red cabin and I can point out on the map the place where the men worked in 1900. I know that Hopkins was working on the Grant Claim in 1903 with Muther. Muther lived in a cabin standing about twenty feet east of the railroad track, and when I was on the claim about ten (10) days ago, Captain Smith was living there in a cabin."

SIDNEY MOORE.

(Trans. pages 554-556.)

"I know the Grant Claim and I acted as a chain man for Gibson when he surveyed the claim in September, 1902. Williams, Howard and Doverspike lived in a cabin on No. 2 East Fork Moonlight in the winter of 1902 and 1903 and I saw them working on the southwest portion. They were sinking shafts and doing rocking in the hole."

AL. BROWN.

(Trans. pages 556-559.)

"I was in the vicinity of the Grant Claim in the spring of 1905. I know Muther and he was mining

on the west end of the Grant Claim then. He was engaged in sinking shafts and stoping out, and his work was open and visible to anyone crossing the claim in that vicinity. I worked myself in 1905 on the Grant Claim for Muther and Bard. I worked about twenty-five or twenty-six days in the last part of March or the first of April. I sank two shafts and worked underground stoping out the running drifts.

“The work done by Muther and Bard in 1905 was within the conflict area and Muther and his men in 1905 lived in the cabin just east of the railroad track.”

(NOTE. The Court refused to permit the witness to testify that during March and April, 1905, neither the Pioneer Mining Co. or anyone in his behalf made any claim while he was working there to any portion of the ground he was working on.)

“I saw Margraf and Rieck working on a portion of the Grant Claim in 1904. They were sinking shafts and running a tunnel, and I was in the tunnel where they were working once. The tunnel is four (4) feet wide and possibly four (4) feet high and about 65 or 70 feet long.

“In the fall of 1905 there was some Russians working out there and they were sinking shafts when I saw them and were quite close to where Muther was working.”

EVERETT SUTHERLAND.

(Trans. pages 260-265.)

“I am acquainted with the claims in the vicinity of Moonlight Springs. I first got acquainted with them in the fall of 1904. I lived in a cabin with Ai. Brown and Hall two hundred (200) feet from the Grant Claim and in plain sight. In the winter of 1904 and the spring of 1905 I saw Mr. Bard and Muther and also Margraf and Rieck working on the Grant Claim. They were prospecting when I observed them sinking shafts and running drifts. During all the time I was out there I never heard of a claim called Bench No. 1 Moonlight.”

GEORGE KNOCHENKA.

(Trans. pages 565-568.)

“I got acquainted with the Grant Claim in 1905 and worked thereon for Bard and Muther. I started to work in January, 1905, working down in a drift with pick and shovel for wages. Sometimes they had five men and sometimes more, more times seven men at work. Men were working in two places on the ground, working in shifts. In one place they were working down in a shaft hoisting up dirt to make a tunnel. I worked a couple of days on the tunnel. The shafts were put sixteen or seventeen feet deep. They took out dumps that year, but

I do not know the size of the dumps, and they were hoisting all winter.

“I also worked with some Russian boys there during the winter of 1905. I worked for about three months. The Russian boys had a lease from Bard and Muther. Four men were working. We took out a small dump in the winter of 1905. We lived in two small cabins close to the railroad. I sold out in January, 1905, but after I sold out returned later on to the claim in the springtime. The other Russian boys continued to work after I left prospecting and did some other work. In the summer of 1906 they sluiced that dump. One of the Russian boys is dead and the other has gone to Siberia. The place where I worked for Bard and Muther is within the ground in controversy. No one connected with the Pioneer Mining Company ever tried to claim the ground where I and the Russian boys were working at that time.”

AUGUST CARLSON.

(Trans. pages 568-569.)

“I know the Grant Claim and first knew it in the winter of 1905. I was employed there the middle of February by W. T. Bard. I worked about a month, and perhaps a little more. We were sinking shafts, making tunnels and stoping, and we took out three dumps, two small ones and one good-sized one. There were nine men employed there at

the time I worked there including Mr. Muther. We lived in the cabins on the east side of the railroad track. We sunk three shafts on the ground in controversy. I know of a tunnel that was constructed there also. I did not work in it but was in it. I went down twenty or twenty-five feet into the tunnel."

ISAAC J. KORTRIGHT.

(Trans. pages 569-571.)

"I know the Grant Claim and knew Captain Sperry very well. He was working on the Grant Claim. Sperry had charge of the Grant Claim and I think he is dead now. I did the work which I did for a man who was employed by Captain Sperry, and Captain Sperry was there every day doing panning.

"I worked in the spring of 1907 after the break-up and assisted Mr. Red Wood in removing the drill from the premises, but I do not know how long he had been drilling on the Grant Claim. The hole that was drilled while I was working there was something like sixty (60) feet in depth. I recall it was on the first plateau or bench."

ALBERT HARTMAN.

(Trans. pages 571-572.)

"I know the Grant Claim and first knew it in 1907. I worked upon it for Louis Woods and he

was working for Captain Sperry drilling. I worked there two days. Mr. Woods had been drilling on the Grant Claim prior to the time I went there but I do not know how long."

EUGENE MINER.

(Trans. pages 572-573.)

"I know the Grant Claim. I knew both Muther and Bard and I saw them on the claim mining, I think, in 1904 or 1905. They were in a cabin there right near the railroad track, a cabin with a canvas shed to it. I saw some shafts there and dirt thrown out pretty near it, a dump thrown out."

S. D. WAYSMAN.

(Trans. pages 573-577.)

"I know the Grant Claim and got acquainted with it in 1906 or 1907. I drilled on it for Captain Sperry. He told me he had a lease from the Pacific Coal & Transportation Company, and I must have drilled there for two weeks. I drilled with a man named Wood. He had a 6" bit with gasoline power and we drilled six or eight holes on the west end of the claim about 200 feet from where Moonlight Springs are, and we lived out there at the time in a black cabin that stood east of us. At the time I was drilling there I became acquainted with the cor-

ners of the Grant Claim and the black cabin was within the boundaries. We drilled west of the railroad. We must have drilled in about six places six or eight holes, and the holes as indicated on the map were within the conflict area. We found gold at the time we were drilling in the southwest corner of the claim, and I made an effort to get a lease at that time. I did not see anyone else in possession other than Captain Sperry and Wood or did I see anyone working within the boundaries of the ground and no one else claimed the ground while I was working there, and no one made any objection or protest to our drilling on the ground."

W. H. BARD.

(Trans. pages 577-585.)

"I acted as attorney for the Pacific Coal & Transportation Company from June, 1903, until June, 1906, and know the Grant Claim, and managed it for the said corporation until 1906. I had a lease in 1904 and 1905 with J. C. Muther and we mined the claim. We extracted winter dumps from a point within the conflict area. So many people have attempted to point out the location of Moonlight Bench No. 1 to me that I was never able to satisfactorily fix the boundary lines of said claim fully. The Pioneer Mining Company never at any time claimed any part of the gold that was mined

by me or my associates or the laymen of the Pacific Coal & Transportation Company on the ground.

“Howard and associates were working on the westerly end of the claim when it was turned over to me and thereafter Margraf and associates had a lease of the property during the winter of 1903 and 1904 and Muther and I had a lease from 1904 and 1905. During the summer of 1905 Hopkins and Belvail worked the property. I executed leases to Muther and myself and to Hopkins and Belvail and Margraf and associates, Margraf and associates worked all over the claim, but the others worked within the conflict area, and the Pioneer Mining Company did not enter any protest so far as I know. The Pioneer Mining Company did go on the claim in my absence and do some assessment work. The Pacific Coal & Transportation Company were in the actual physical possession of the westerly end of the claim during the years 1903, 1904, 1905 and 1906 to my knowledge and during the time that I was in charge of the claim, the Pioneer Mining Company never tried to exercise any possession or ownership over said westerly half with the exception that in 1904 Mr. Lindeberg sent over a man who informed me that Lindeberg had requested me to stop working, but I put the man off the claim, and never heard anything more of it.

“I saw the stakes of the Grant Claim. They were large, substantial stakes plainly marked and indicated the center and corners of the claim, and

in 1903 there were stakes that thoroughly marked and fixed the corners and centers of the claim. I examined the stakes very thoroughly many times in 1903. I never knew definitely where Bench No. 1 Moonlight was located. The Pioneer Mining Company know that the claim was being worked by the Pacific Coal & Transportation Company. I was furnished water from the ditch of the Pioneer Mining Company to clean up within the spring of 1905. The managers of the Pioneer Mining Company have always known during my time that I was connected with the Pacific Coal & Transportation Company.”

S. LYNN FOX.

(Trans. pages 585-586.)

“I know the Grant Claim and first got acquainted with it in 1908. I know the defendant, M. D. McCumber, and entered into a contract with him to do a certain amount of work on that claim. My associate was Ben Hersey. I contracted to sink a shaft one hundred (100) feet deep and went on the claim that fall and sunk a shaft in December, 1908, twenty-four (24) feet. We lived at that time on the Grant Claim. We continued the work in January, 1909. We sank the shaft 84 feet. Mr. McCumber paid us for the work. We started on the 8th of December, 1908, and worked until the 21st and then started again on the first of January and worked until the 20th of April, working continu-

ously. I executed an annual proof of labor for the Grant Claim for Mr. McCumber for the year 1908. I was acquainted with the boundaries of the Grant Claim and have been around them several times and no one else occupied any portion of the Grant Claim at the time Mr. Hersey and I was there."

BENJAMIN A. HERSEY.

(Trans. pages 587-589.)

"I know the Grant Claim and got acquainted with it in 1908. I became familiar with its boundaries and markings. I worked on the claim for McCumber with Mr. Fox and we lived on the claim. We did the work as testified to you by him. I also did some surface prospecting. I know the portion of the Grant Claim in controversy, and I know where the railroad crosses the west end of the claim. I did considerable prospecting west of the railroad track. I would dig a ditch like and would dig beneath the sod and see if there were any surface diggings, and I had to dig away considerable snow to do my prospecting, and the prospecting work which I did was within the bounds of the ground in controversy. During the time I was working and living on the ground, no one else was living on the ground or in actual possession of any of the ground in controversy."

STEVE JOHNSON.

(Trans. pages 589-591.)

"I first got acquainted with the Grant Claim in 1907 and knew Captain Sperry and Captain Aansen. I did some work with Captain Aansen with a drill on the Grant Claim in 1907. We drilled the upper end of the hillside toward the northeast corner of the claim. We drilled a hole about 104 feet deep and were paid \$2.00 a foot for the work by Sperry. At the time we were drilling there was another drill at the end of the claim which we called Red Wood's drill. He was drilling in the southwest corner."

OLE ANSON.

(Trans. pages 591-595.)

"I have known the Grant Claim since the spring of 1907. I put a hole down there to bedrock, and was assisted by S. S. Johnson. We did the work for Eugene Sperry. Mr. Wood's drill was standing down towards what is called the southwest corner, at the time I was working the claim. I saw Mr. Wood drilling. I do not know exactly how long he drilled there, but he drilled there any way during the time I put down two holes on the Martin Bench, probably about three weeks. I never observed anyone else working or living within the boundaries of the Grant Claim other than the ones I have mentioned during the time I was there."

ADOLPH MEYER.

(Trans. pages 594-615.)

"I know Mr. McCumber and I know the Grant Claim and got acquainted with it on the 3rd day of November, 1909. I know where the monuments and stakes of the claim are. I moved a red cabin on the Grant Claim on the 3rd day of November, 1909, and the cabin is still there and has been on the claim ever since I put it there, in exactly the place where I put it. The cabin is on the part of the Grant Claim in controversy in this lawsuit. A man by the name of Pelitsch and I did some mining and sinking a shaft on the claim in 1909 below the railroad track towards Moonlight. We dug a hole about 17 feet deep, and we dug other shafts afterwards. In the southwest corner we dug a hole about 11 feet deep and struck a slide. We continued to work again on the 3rd of November, 1909, all winter. Besides Pelitsch, a man named Fitzlaff was working there for wages and John Kobovich. After Pelitsch quit I had a partner named Louis Kern. Albert Miller also worked there. Also John Alderhall, Leo Wilhelm and a Russian named Malkoff, and a man by the name of Herman Fleming, and Henry Kern. We dug more shafts, and dug one shaft 28 feet deep, using a 6 H. P. boiler and 2" pump."

(NOTE. The Court refused to permit the witness to testify that he had determined there was a channel at that point in the shaft.)

“This shaft caved in and we dug another shaft at that point, a little above ten feet away, toward the southwest corner stakes. It was a big shaft. We timbered that shaft and I was working at it about a month. I had an arrangement with Mr. McCumber to dig 150 feet, shaft 150 feet, and if I struck pay I would get a sub-lease on the 150 feet of the ground for one year. Mr. McCumber employed men to work on that shaft with me and paid them. The men whose names I have mentioned worked on the last hole. During this time I lived in the red cabin. Defendant's Exhibit 22 is a photograph of the red cabin. I put it on the claim and lived in it while I was digging these shafts.

“I know Mr. Stevenson of the Pioneer Mining Company. He was there and saw us working and never made any objection. The last shaft that was timbered we worked on about a month from the 10th day of March until the 22nd of April, 1910, and after I finished, I left the tools in the cabin, and left the cabin on the 12th day of May, 1910. After I left the shaft I did some other work. I put boards on top of the cribbing and covered the shaft all up, so as to save it for the next winter so it would not cave in. I intended to go back and work in the same shaft. The shaft was 35 feet deep and very close to bedrock, and I found gold at 29 feet pay ground, and from the 29 foot level, I panned down to 35 foot level and got pay ground. From the 12th of May until the fall of 1910, I was living near the claim, and was coming out by the claim.

I had charge of the claim that summer for Mr. McCumber. Yes, I had things in that cabin that summer, winter bedding, a bag, an axe and saw and powder. From the 12th of May until the fall of 1910, I was there four or five times a week on the ground and had charge of the claim for Mr. McCumber. I went back to the claim on the 27th of October, and on the 27th of October, I was bringing out the stuff and moved that old stove out, and put it in and took the old rusted stove out, and was on the claim about an hour.

“On the 29th of October, I moved out grub. I moved out stove-pipes and building paper and was there about a couple of hours. At that time I was bringing out stuff for working in the winter and living there. On the 30th of October I took out a few coal sacks and dishes, a big bucket and small barrel, I put them in the house there, the cabin, and was on the claim about three-quarters of an hour. I was on the claim again the next time on the 31st of October. I moved out some lumber for fixing up the cabin. I got that lumber at Mr. McCumber's yard. I was next on the claim on the 2nd of November, 1910, and I moved out a sack of coal and took it out with my dog team. I was next on the claim on the 3rd of November, 1910. On that day I brought out a windlass drum, cribbing and a cable. The cable for sinking a shaft. The windlass drum also for sinking a shaft. I was looking after the rim of the shaft. I was going to sink a new shaft. I was next on the claim on the 4th of

November. I brought out my bedding and the rest of the coal sacks and the big boiler, and I came back to the claim on the next day of the 5th of November. That day I brought out my grub and did some work. I brought out two stove pipes, a six inch pipe and caps for the top on the roof, and I brought the stove pipe in and wanted to make it smaller. After that I brought the water and started a fire and then I was living there on the 5th of November. When I was fixing my stove pipe I was on the roof of the cabin, and I slept in the cabin on the night of November 5th. On the 6th of November I was there in the cabin. I brought a little water for breakfast, after that broke a few boards, that was the new shaft. The 3 x 4 boards were broken in pieces, and where the timber was held in the shaft, that was broken in two pieces. During those days the 5th and 6th of November, I put building paper on the cabin, on the northeast side. I was engaged in carpenter work on the cabin, hammering and driving nails. I did some work down around the shaft on the 6th of November and fixed the cabin on the inside and outside and went on the roof and started to put on the building paper. On the night of the 6th I stayed in the red cabin. On the 7th of November I was on the Grant Claim fixing up the stove and putting building paper on. I was all day on the claim and around the cabin. Between the 27th day of October and the 7th of November, 1910, I did not see Mr. Stevenson in that vicinity nor did I see anyone working on the 6th

or 7th of November, near by where I was living. They were working close to the railroad track 500 or 600 feet towards Little Creek."

A. G. KINGSBURY.

(Recalled)

"I advertised Mr. Grant and his assigns out in the years 1900 and 1901."

(NOTE. The proof of labor in the nature of an affidavit by A. G. Kingsbury showing \$100 worth of work done on the Grant Claim for the year 1900 was introduced in evidence.)

(NOTE. An attempt was made to introduce proof of labor signed Pacific Coal & Transportation Co. per A. G. Kingsbury, showing labor done on the Grant Claim for 1901, but the Court refused to permit the same.)

(NOTE. An attempt was made to introduce proof of labor signed by A. G. Kingsbury showing work performed upon the Grant Claim for the year 1902, but the offer of proof was rejected by the Court.)

(NOTE. An attempt was made to introduce proof of labor signed by B. G. Simmons and J. Bunt showing work performed on the Grant Claim at the expense of the Pacific Coal & Transportation Company for the year 1903, and the attempt was successful and the proof of labor was admitted in evidence.)

(GEORGE D. SCHOFIELD.

(Trans. pages 626-638.)

Proof of annual labor for the year 1906 on the Grant Claim, said proof being made by W. H. Bard, was introduced in evidence.

Proof of annual labor upon the Grant Claim for the year 1907, signed by Eugene Sperry, was admitted in evidence.

Proof of annual labor on the Grant Claim for the year 1909, signed by Ben Hersey and S. Lynn Fox, admitted in evidence.

Proof of annual labor for the year 1909 on the Grant Claim, signed by Ben Hersey, was admitted in evidence.

Proof of annual labor on the Grant Claim for the year 1910, signed by M. D. McCumber, was admitted in evidence.

(NOTE. The Court refused to admit in evidence an Amended Water Right Location Notice bearing date July 17, 1905, made by the Pacific Coal and Trans. Co., through W. H. Bard, agent.)

The purpose of the location notice was to locate and appropriate all the water running through the Grant Claim.

LOUIS KERN.

(Trans. pages 638-641.)

“I know the Grant Claim and worked on the claim from the 12th day of February to the 5th day of May, 1910, with Adolph Meyer. I attended to the boiler and pumps as engineer, and while working there lived in the red cabin. We worked on the southwest corner of the claim about 50 or 60 feet from the corner right near the line. We

dug a shaft about 27 feet deep. I worked on the first shaft that was dug. It was a 4x8 shaft. We had a pumping station down in it. We had two, a pumping station down in it—a stationary pump. We had two pumps in the shaft all the time, one was stationary, the other a steam pump. We pumped all day and night. The second shaft was about 35 feet. No one molested us while we were working there. Neither the Pioneer Mining Company or anyone on its behalf made any claim to the ground while I was there. I never remembered seeing Mr. Stevenson on the claim. I lived in the red cabin on the claim from the 12th day of January to the 5th of May.”

HENRY KERN.

(Trans. pages 641-644.)

“I know the Grant Claim and got acquainted with it in the year 1904-1905. I worked on the claim in 1910, from the last of March until the 27th or 28th of April, and I worked for McCumber and Adolph Meyer. I worked on top handling a windlass, and also did some other work besides. We worked on the southwest corner about 50 feet to the north near the line sinking a shaft. I worked on both the shafts. We had three boilers and four pumps there. No one else was on any part of the Grant Claim, other than the men working for and with Adolph Meyer during the time I was there.

Neither did the Pioneer Mining Company or anyone on its behalf make any claim to the ground in my presence during the time I was working there. I was paid in full by Mr. McCumber. I first knew the claim in 1904 and 1905. I passed by there in 1904 and 5. Mr. Muther was working the ground. I knew him. He had a pan and was panning."

ALBERT MILLER.

(Trans. pages 644-646.)

"I know the Grant Claim and first got acquainted with it in 1910, and performed labor for Mr. McCumber in March and April of that year sinking shafts. The first shaft was 27 feet deep and the second 35 feet, and I worked down in the hole."

(NOTE. The Court sustained the objection to the witness testifying as to whether or not that shaft was in what is considered an old channel.)

"I saw the red cabin while I was working there. While I was working there, there was no one else in possession of the conflict area of the claim. I know where the boundaries of the Grant Claim are. I know where the southwest corner is. We were working from 80 to 100 feet from that corner. I did not see Stevenson on the Grant Claim while I was there."

JAMES WALET CHARLES.

(Trans. pages 646-647.)

"I have known the Grant Claim since 1904 and 1905. Mr. Muther was working on the claim then. I should say in the hole about 20 feet east of the railroad track close to the dam. I worked on the claim in June, 1911."

(NOTE. The Court refused to permit Mr. Charles to testify that he resided on the claim and was employed by McCumber from the 1st of May, 1911, until the 7th of July, 1911.)

THOMAS D. JENSEN.

(Trans. pages 650-682.)

"I am the son of Andrew Jensen and I know the Grant Claim in the vicinity of Moonlight Springs. I had correspondence with my father Andrew Jensen during the fall of 1910 and the spring of 1911 with reference to the ground in controversy in this action. The first letter was written during the first days of November, 1910, and the last one a little before the middle of December, 1910. I received a reply from my father to both the letters. I have not either of the letters which he wrote in reply. One I destroyed and the other I could not find. I destroyed one of them because I did not wish to

introduce them as evidence in this case. One of them I think was in my sister Katie's handwriting."

(NOTE. The Court refused to permit the witness to testify as to whether the letter informed him that the letter was written at his father's dictation.)

(The Court refused to permit the witness to testify that a letter which he had written dated Concil, Mar. 28th, and written to William A. Gilmore, attorney, contained a correct quotation from the letter which the witness destroyed with reference to the matter in controversy in this action.)

(The Court also refused to permit the witness to testify that he copied some parts from his father's letter, when he wrote to Mr. Gilmore.)

(The Court refused to permit the letter written to Mr. Gilmore to be introduced in evidence, which letter is defendant's Exhibit "C" and is marked defendant's Exhibit 50 for identification.)

(The Court refused to permit the witness to testify that the letter dated Alaska, April, 1911, written to Gilmore, contained a correct quotation from his father's letter with reference to the ground in controversy.)

(The Court refused to permit the introduction of evidence of a map or drawing received by the witness from his father and in his father's handwriting and bearing upon the ground in controversy, which map is marked Exhibit "A".)

"The first I ever heard of the Grant Claim was in the fall of 1899. My father was on the ground with me in 1900."

(The Court refused to permit the witness to testify as to whether he had a deed of the claim

from his father or whether it stood in his father's name, and refused to permit the witness to testify that he had one-half interest in the property.)

“I sold the claim in the spring of 1902 for my father to D. W. McKay.”

(The Court refused to permit the witness to testify as to where he claimed that Moonlight No. 1 Claim lay during the time he was an owner, and refused to permit him to give its direction from Moonlight Springs.)

(The Court also refused to permit the witness to testify that during the time he was an owner he never conflicted with the Grant Claim.)

(The Court refused to permit proof of fact that during the time he was an owner of an equitable half interest in the claim of No. 1 Bench from 1900 to 1902 that he never knew that it conflicted in any way with the Grant Claim.)

“Up to the time I sold to McKay in 1902 I never heard of any claim between the Grant Claim and Bench No. 2 off Moonlight.”

(The Court refused to permit the introduction of a letter dated Sept. 12, 1910, written by the witness to his father.)

(The Court refused to permit the witness to introduce as evidence letter dated April 11, 1911, from the witness to Mr. Gilmore.)

M. D. McCUMBER.

(Trans. pages 713-735.)

“I am one of the defendants in the case. I know the Grant Claim and have done work and caused

work to be done on the Grant Claim in the years of 1908-09-10 and 1911. The first work I did was in 1908 under a contract with Fox and Hersey. They sunk a shaft about 18 feet from the southwest corner of the ground in controversy in this action, and they continued to work on the claim until the spring of 1909 and I paid them for the work. I had a written lease from the Pacific Coal & Transportation Company, and I caused further work to be done in the fall and winter of 1909.

“Meyer and Pelitsch had a sub-lease on the 150 feet of the southwest corner and they sunk several shafts. They placed a cabin on the Grant Claim at my request, a red cabin, which stands there at the present time, and that cabin has never been moved from the time it was placed there in November, 1909, until the present time. Meyer and his associates sunk several shafts for me in the southwest corner and they averaged from 11 to 16 feet in depth. In the spring of 1910 between January and May, there was a great deal of work done in the southwest corner of the Grant Claim. The work was done by Meyer, Miller, Hanson, Kern and the Russians and one or two other men, whose names I cannot recall. In the spring of 1910 they dug two shafts in the southwest corner within the ground in controversy. The first was 27 feet deep, and the second 34 feet, and they used three boilers and four pumps, and the machinery was visible to anyone passing across the ground in that vicinity. They ceased work about the last days of April to my

recollection. It was about breakup time, and it was not practical to continue the work which they were doing at that time. After the machinery was moved, I had Mr. Meyer timber the shaft for protection, so that we could continue the following fall. To my knowledge pay was struck in these shafts.

“Mr. Allison Bruner was the agent of the Pacific Coal & Transportation Company looking after the ground during the summer and fall of 1910, and I arranged with him that I could cease operations until November, 1910, and I made arrangements to resume work on the first of November, 1910.

“I sent Adolph Meyer out to the ground on the 27th day of October, 1910, and he remained on the claim representing me all that winter and the next spring. I believe it was April 30, 1911, when he ceased. J. W. Charles succeeded him.”

(The Court refused to permit the witness to testify that Adolph Meyer represented him on the ground until the 1st of May, 1911, and J. W. Charles lived in the red cabin on the ground in controversy until the 7th day of July, and Captain George Smith has lived on the ground ever since and is now living there.)

“I had a conversation with Louis Stevenson in November, 1910, in the postoffice in Nome with reference to the ground in controversy, and I told him what I was contemplating doing on the ground. I fixed the date because I was a little suspicious, and I had my lease from the Pacific Coal & Transportation Company recorded the 1st day of November.

The work that I caused to be done in 1908 and 1909 by Hersey and Fox was of the value of one hundred (100) dollars.”

(The Court refused to permit the witness to testify as to what was the value of the work between the 30th of November, 1909, and November 7th, 1910, the time of the institution of the suit.)

“I spent eighteen hundred (1800) dollars for labor, supplies, materials and other things upon the ground in controversy between the 30th day of November, 1909, and the 7th day of November, 1910.”

(The Court refused to permit the witness to testify that the Pioneer Mining Company attempted to buy his title to the ground in controversy prior to the institution of the suit.)

We have called attention to the evidence on the question of adverse possession introduced by defendants more at length than is usually justified in a brief, inasmuch as we feel perfectly certain that the lower Court must have ignored all of this testimony in finding against the defendants on the question of possession. The lower Court was of the opinion that the long established adverse possession of defendants was of no avail while defendants were holding title in subordination to the title of the United States Government.

It cannot be possible that the lower Court thought that all of the witnesses whose testimony we have summarized were not telling the truth, and therefore we are forced to the conclusion that the Court believed that no amount of testimony under the facts of the case could show adverse possession in defendants.

DOES THE TESTIMONY OF PLAINTIFF SHOW THAT THE ADVERSE POSSESSION OF DEFENDANTS WAS INTERRUPTED?

The question involved is as to whether the alleged acts of plaintiff which he claims amount to a possession of the ground on his part were such acts as would show a manifest intent to use the ground for the purpose for which it was located. We have the clear situation of defendants and their predecessors in interest, using the claim and especially the conflict portion thereof for a period of ten (10) years for mining purposes. The best that can be claimed for the testimony of plaintiff is that it shows that the plaintiff was using the ground simply for the purpose of an easement for ditch, pipe lines and pen-stocks.

This user by plaintiff can not amount to the dignity of a possession such as the law indicates is necessary to interrupt defendants' adverse possession, especially in view of the fact that plaintiff at the same time was using in the same way other adjoining mining claims concerning which plaintiff makes absolutely no claim of title whatsoever. The

situation is made no better by the evidence that each year since the construction of the penstocks, ditch and pipe lines, plaintiff expended from \$800 to \$1200 in repairs and improvements and cleaning the pipe lines upon the ground in controversy.

The evidence shows clearly that plaintiff spent about the same sums of money in repairs and improvements and cleaning of pipe lines upon other ground and claims, which plaintiff did not assume to own but over which presumably plaintiff had some kind of an easement. (Trans. p. 253.) (Trans. p. 256.) In view of the peculiar attributes which appertain to mining ground; and in view of the fact that defendants, as will be shown later, had a clear legal right to quiet title to their ground by adverse possession, while at the same time, admitting paramount title in the U. S. Government; and in view of the fact that an easement might have been secured by plaintiff from the Government for pipe lines or railroads over the land in controversy we submit that the testimony of plaintiff in this regard does not show adverse possession in plaintiff, nor does it interrupt in any way the adverse possession of defendants.

It is next contended that the testimony of plaintiff shows that from the 12th of May to the 27th of October, 1910, defendants were not in the actual possession or engaged in mining upon the Grant Claim, and especially on the ground in controversy, and that during said time plaintiff carried on ex-

tensive mining operations on the claim by hydraulic process, and that on the 7th day of November, 1910, the date of the commencement of the action, two employees of the plaintiff were engaged in mining upon the claim (Trans. p. 98). This is the only serious interruption of the possession of defendants which so far as we are advised plaintiff asserts. It will be observed that the testimony of defendants shows that from the time of the location of the claim January 9, 1899, until the 12th of May, 1910, defendants' possession was not disturbed. The testimony on the part of defendants which we have already called attention to shows that although work was not being actually done during the time specified by plaintiff work was in contemplation and preparations were being made to resume work, and McCumber, the lessee, had permission of the agent of the Pacific Coal & Transportation Company to cease work for the period until November 1, 1910, the reason therefor being clearly given (Trans. p. 716).

Let us concede for the sake of the argument merely, that plaintiff did interrupt defendants' adverse possession of the ground on the 12th of May, 1910. The learned Judge of the Court below on page 98 of the transcript, in summing up the testimony which seemed to the Court to show that the defendants' possession was interrupted, closes the summary with the statement which we have heretofore made under this head of our argument.

We submit, however, that if it be conceded that defendants' possession was interrupted, adverse and notorious and under color and claim of title for seven years prior to the 12th day of May, 1910, then defendants would be conclusively presumed to have acquired title by prescription and the interruption on the said date, if such interruption took place, could not in fact deprive defendants of their acquired possessory title.

It is obvious to counsel for the defendants who are studying this case with the evidence before them, and with the advantages that come from a birds-eye view of the situation, that the learned Court below and the counsel who tried the case for plaintiff were of the opinion that a title could not be acquired by a subsequent locator as against a prior locator, by adverse possession for the seven-year period, and that it was absolutely necessary for defendants to hold physical possession of the claim for every day in the year and every hour of each day up to the date of the filing of the complaint herein.

Defendants were justified in proving, as they certainly did prove, that they had actual physical possession of the claim on the very day when the suit was brought. The obvious purpose of insisting upon this proof was in order that defendants might not be denied their constitutional right to a trial by jury and in order that they might show that the Court sitting as a Court of equity had no jurisdic-

tion to try the case upon the equity side of the Court. But so far as the question of adverse possession is concerned, defendants might well have rest content with showing that they had acquired a prescriptive title by adverse possession to the ground in controversy under color of right long before the plaintiff, spurred on by avarice after seeing the paystreak exposed, brought the suit at bar for the purpose of taking defendants' claim away from them.

We may well assume under this head of our argument that the Court below in summing up the testimony on the question of possession on page 98 of the transcript, draws conclusions most favorable to the plaintiff. The Court says:—

“Thus far there is no dispute.”

Mr. Lindeberg was the president of the plaintiff corporation and notice his testimony upon this point (*italics ours*):

“Q. Did you ever do any mining whatever, within the boundaries of the disputed area?

“A. *Never any actual mining, no, sir.*

“Q. Have you at any time, you or the Pioneer Mining Company, been in possession of a solitary foot of the disputed area?

“A. I think we have always been in possession of the claim.

“Q. Now, tell the Court in what way you have been in possession of this disputed area, if you can?

"A. *We have had our pipe line across the claim; we have drilled across as we have practically run across all of our claims, crossing this ground.*

"Q. You have at the present time the same water pipes strung across the ground in conflict?

"A. Yes, sir.

"Q. On the same claim?

"Q. Don't all of the works that you have now cross on the (41) Moonlight Claim in the same way at the westerly end?

"A. Yes, sir.

"Q. On Moonlight?

"A. Yes, sir.

"Q. And on Bench No. 1 and the Winter fraction?

"A. Yes, sir.

"Q. And numerous other claims now owned by the Pioneer Mining Company and in that vicinity?

"A. Yes, sir.

"Q. And you have some pipes strung over the rest of the ground claimed in the same manner, the ownership claimed in the same manner, as the ground in conflict?

"A. Yes, sir.

"Q. So that you have the same possession of the whole of the Grant Claim that you claim to have of the ground in conflict?

"A. You could call it that."

Trans. pp. 252-253.

May we then conclude that the only testimony which in any way tends to disturb the years of

adverse possession proved by defendants is the testimony summed up by the learned Court? If this assumption be one that is justified from the transcript before us, then the conclusion is inevitable that the defendants acquired a prescriptive title by adverse possession under the Alaska statute to the ground in controversy long before the dormant plaintiff was stirred by the sight of the pay gravel into litigious activity.

For the purposes of argument upon this branch of the case, we may throw out the testimony of Adolph Meyer which seems to be the only testimony of the defendants seriously disputed, and we submit most earnestly that the defendants are shown by all the evidence in the case to have had a perfect prescriptive title to the conflict area between the two claims, Moonlight Bench No. 1 and Grant Claim at the time of the filing of the complaint by plaintiff.

THE HOLES DRILLED BY DEFENDANTS.

It may be contended by the defendants that the plaintiff disturbed the possession of defendants by drilling holes upon the ground in controversy in 1907. The testimony of John Brower (Trans. pp. 256 to 263), and John Langstrom (Trans. pp. 263 to 269) shows that the defendants procured some holes to be drilled very close to the line between Moonlight or Lyng Claim and the west line of the Grant Claim. As we read this testimony and note

the very significant circumstance that the holes were drilled close to the western line of the Grant Claim and near the dam, we are compelled to conclude that the plaintiff through its manager, Mr. Stevenson, was trying to keep as close to the line as possible, and in fact, did not intend to go over the line at all.

If the plaintiff at that time was claiming to be the owner of the conflict area which is the subject of the dispute in this action, it is a coincidence rising to the dignity of a miracle as to why the holes were dug so close to the real line between Lyng's claim and the Grant Survey. We must remember at this point that plaintiff at the time of the drilling owned the Lyng Claim.

The witness John Brower was evidently an exceedingly hostile witness and did not care to know anything except the fact that he had drilled holes at the direction of Mr. Stevenson. He was forced to admit that there might have been men working on the Grant Claim at the time he drilled the holes, but he did not pay any attention to whether they were working there or not, and he knew nothing about any lines, but put the holes down where he was instructed.

The witness John Langstrom was also confined largely by the exigencies of the case to his testimony to the effect that he drilled the holes where he was told and did not know where the lines of the Grant Claim were. He had no orders from Mr.

Stevenson not to cross any particular line. He followed the line because Charley Johnson told him to, and he did not know how close the dam was to the line between the two claims.

We repeat that the fact that the holes were dug so close to the line indicates to our mind clearly that the plaintiff at that time recognized the line, and the plaintiff only stepped over the line later when he filed the complaint or just prior thereto.

Summing up then the testimony on the question of adverse possession of defendants, we believe that no serious dispute of fact is involved and that if we can show that under the facts and circumstances of this case a title can in any event be acquired by prescription, the case at bar makes out a clear title by prescription resting in defendants long prior to the commencement of this action.

“Adverse possession, generally speaking, is a possession of another’s land, which, when accompanied by certain acts and circumstances, will vest title in the possessor.

“No matter in what jurisdiction the determination of what constitutes adverse possession may arise, the decisions and textbooks are unanimous in declaring that the possession must be actual, visible, exclusive, hostile and continued during the time necessary to create a bar under a statute of limitations. * * *

Cyc., Vol. 1, p. 981.

“Actual possession of land consists in exercising acts of dominion over it and in making the ordinary use of it, and in taking the profits

of which it is susceptible. * * * It is ordinarily sufficient if the acts of ownership are of such a nature as a party would exercise over his own property and would not exercise over another's. Actuality of possession is a question compounded of law and fact, and its solution must necessarily depend upon the situation of the parties, the nature of the claimant's title, the character of the land, and the purpose to which it is adapted and for which it has been used. All these circumstances must be taken into consideration by the jury whose peculiar province it is to pass upon the question. * * *"

Cyc., Vol. 1, p. 984.

Nevada Sierra Oil Company v. Home Oil Company, 98 Fed. 673.

"One who is in the actual possession of a mining claim, working it for the mineral it contains and claiming it under the laws of the U. S., whether the location under which he so claims is valid or invalid, cannot be forcibly, surreptitiously, clandestinely or otherwise fraudulently intruded upon or ousted, while he is asleep in his cabin or temporarily passing from his claim."

"It is well settled that title to an unpatented mining claim may be acquired by adverse possession. This follows logically from the provisions of Rev. St. U. S. 910 (U. S. Comp. St. 1901, p. 679) requiring each mining case to be adjudged by the law of possession, regardless of the fact that the paramount title to the land is in the United States. Moreover, in Rev. St. U. S. 2332 (U. S. Comp. St. 1901, p. 1433) express provision is made that possession of a mining claim for the period of the state statute

of limitations 'shall be sufficient to establish a right to patent thereto * * * in the absence of any adverse claim', and despite some decisions to the contrary, it would seem to be clear that, even if there is an adverse claim, the law of possession shall govern. Twenty years' open occupation of a mining claim under color of title will entitle a plaintiff to enjoin a location of the same ground by defendant, even though no evidence is introduced to show the devolution of title from the original locator to the plaintiff. In most states it seems that a much shorter time will suffice."

Costigan on Mining, p. 524.

"What constitutes adverse possession of mining claims is the same as what constitutes it in other real property. Secret underground mining will not serve; but such open, continuous and exclusive acts of possession and of mining as the nature of the business and customs of the country call for will suffice. Where the estate in the minerals has been severed from that in the surface, adverse possession of the surface does not carry with it adverse possession of the minerals."

Page 525, Costigan Mining Laws.

SYLLABUS: Where a purchaser of mining claims has held them adversely for the period of limitation, it will be presumed against an adverse claimant that the claims were regularly located.

Buffalo Zinc & Copper Co. v. Crump, *supra*,
70 Ark. 525; 69 S. W. 572.

SYLLABUS: For when fee is once acquired by five years' adverse possession, it continues in possessor, till conveyed in the manner pre-

scribed in conveyance of title acquired in other modes, or till lost by another adverse possession of five years.

Cannon v. Stockman, 36 Cal. 535.

Webber v. Clarke, 74 Cal. 11.

SYLLABUS: This is a theory that adverse possession for period provided in statute operates to convey complete title to party as much so as any written conveyance. And such title is not only an interest in land, but it is one of highest character, absolute dominion over it, and appropriate mode of conveying it is by deed.

Kerr's Cyc., Vol. 3, p. 25.

We have now prepared the way for the discussion of the legal question which is directly presented under this head of our argument.

(b)

**DEFENDANTS' TITLE BY PRESCRIPTION IS ESTABLISHED AS
A LEGAL CONCLUSION FROM THE FACTS PROVED.**

Section 1042 of the Alaska Code of Civil Procedure (Carter's Codes, p. 354) reads as follows:

"The uninterrupted adverse notorious possession of real property under color and claim of title for seven years or more shall be conclusively presumed to give title thereto, except as against the United States."

Section 4 of the Alaska Code of Civil Procedure (Carter's Codes, p. 145) reads as follows:

"The periods prescribed in section three of this act for the commencement of actions shall be as follows:

“Within ten years actions for the recovery of real property, or for the recovery of the possession thereof; and no action shall be maintained for such recovery unless it shall appear that the plaintiff, his ancestor, predecessor or grantor was seized or possessed of the premises in question within ten years before the commencement of the action: Provided, in all cases where a cause of action has already accrued, and the period prescribed in this section within which an action may be brought has expired or will expire within one year from the approval of this act, an action may be brought on such cause of action within one year from the date of the approval of the act.”

Because of the importance of the question discussed under this head of our brief, and because the learned judge of the lower Court in effect decided in the case at bar that a title can in no event be acquired by adverse possession by one in possession of public lands who holds in subordination to the United States Government (Trans. pp. 104-109), we shall examine the cases on both sides of the controversy, with a view to getting at the real principles involved.

Tyee Consolidated Mining Co. v. Langstedt,
136 Fed. 124 (C. C. A., 9th Circuit Alaska,
March 6, 1905).

The Court says in its opinion, at page 125:

“The writ of error presents the question whether, in the territory of Alaska, adverse possession of a mining claim, as against the locator thereof, or his successors in interest, can be initiated at any time before the issuance

of a patent from the United States therefor * * *. It is well settled that the Statute of Limitations begins to run against a grantee under the general land laws of the United States only from the date when he acquires the title, and that an occupancy by another prior to that time will not be deemed adverse to the title of such grantee. But there is adversity of opinion as to the precise time when the title passes from the Government to an entryman upon the public lands.

“* * * In some Courts, it has been held that the title passes to such an entryman as soon as he has complied with all the conditions requisite to entitle him to a patent, and that at that point of time an adverse possession may have its inception.

“* * * The ruling of the Court below in holding that the possession of the defendant in error was adverse prior to the time of the issuance of the patent was based upon the consideration that the laws regulating the disposal of mineral land are essentially different from those that control the disposal of agricultural lands and confer upon the locator of a mineral claim an estate of such a nature as to render inapplicable thereto the doctrine that the Statute of Limitations begins to run only from the time of the issuance of the patent.

“It is true that the locator of a mineral claim has, prior to the issuance of the final receiver's receipt, a broader control over his claim, and a higher estate therein than an entryman of agricultural land. But after full compliance with all the conditions by which a patent is authorized to be issued, there is no perceptible difference in the two estates. In cases where the question has been presented for adjudication, the Courts have uniformly held that the Statute of Limitations does not begin

to run against the claimant of a mining claim before his patent issuance.”

The fundamental doctrine of the case is very well stated in the syllabus, as follows:

SYLLABUS: Since there could be no adverse possession of public land on which a mining claim was located while the title was in the United States, there was no disseisin sufficient to start the Statute of Limitations in operation, as against the locator of said claim, prior to the issuance of a government patent to him therefor.

In

Tyce Consolidated Mining Co. v. Jennings,
137 Fed. 863 (C. C. A., 9th Cir. Alaska
Div., May 1, 1905),

the same doctrine was announced and is found in the syllabus as follows:

Adverse possession of a mining claim in the territory of Alaska, as against the locator or his successors in interest, cannot be instituted before the issuance of a patent therefor by the United States.

The sections of the Code of Civil Procedure for Alaska under consideration, to wit, Section 1042 (Carter's Codes of Alaska, page 354), and Section 4 of the same code (Carter's Codes, p. 146), were in effect a re-enactment of the same sections of the Code of Civil Procedure of the State of Oregon. By the act of Congress of May 17, 1834 (23 Statutes 24), and the act of June 6, 1900, the Code of Civil Procedure for Alaska was adopted and the

sections under review are almost identically the same as the similar sections in the laws of Oregon.

It is true that prior to the adoption, for Alaska, of the Oregon Code of Civil Procedure, the cases of *Altschul v. O'Neill*; *Altschul v. Clark*, and *Beale v. Hite* had been decided by the Supreme Court of Oregon. It would therefore seem to follow that so far as the District of Alaska is concerned, in adopting the Code of Civil Procedure of Oregon, the interpretation of these sections given by the Supreme Court of Oregon was adopted as the interpretation of the laws applicable to Alaska.

But after the decision in the three cases above specified, and after the incorporation of the Oregon law into the Alaska Code, the case of *Boe v. Arnold* (102 Pacific Reporter 290) came before the Supreme Court of Oregon on the first day of June, 1909, for decision, and we contend that the decision in the case flatfootedly overruled the three previous decisions of the Supreme Court of Oregon.

There is no doubt but that the Circuit Court of Appeals for the 9th Circuit, in the interpretation of the Alaska Code, considered itself more or less bound to a great extent by the interpretation which had been put upon the code by the Supreme Court of Oregon.

We are strengthened in this view when we consider the case of *Eastern Oregon Land Company v. Brosnam et al.*, C. C. A. (9th Circuit, September 7, 1909) 173 Fed. 67, where as we shall see, the said Circuit Court of Appeals adopts the decision of

Boe v. Arnold and by implication overrules the two Tyee cases.

We shall now consider the case of

Boe v. Arnold, *supra*.

The facts of the case show that the defendant and his grantors claimed title and settled upon the land in question in 1881 and resided thereon continuously under the homestead laws until 1893, when plaintiff filed his application for homestead. It also appears that from the date of his settlement until his death, Chandler, from whom the defendant claimed title, was in open, notorious, exclusive and adverse possession of the land, living upon it, improving and cultivating it and claiming it adversely to everyone except the United States.

It also appears that the plaintiff claimed title by virtue of a grant under which "there be and is " hereby granted alternate sections of public land " designated by odd numbers, three sections per " mile to be selected within six miles of said road".

The learned Court in writing its opinion reviews exhaustively the Oregon cases of *Altschul v. O'Neill*; *Altschul v. Clark*, and *Beale v. Hite*, and also cases from Texas and Missouri and California, and in the course of the opinion says:

"It is true that limitation will not run when the land is vacated, and title remains in the State, but such is not the case here, and we can perceive no good reason why one in possession of land under the mistaken belief that it is va-

cant, asserting an exclusive and adverse claim, having the exclusive use and enjoyment of it under a claim that it is hostile to the true owner, may not rely upon such possession in order to prescribe under the 10-year statute.

* * * * *

“In view of the authorities here cited, and especially in the light of the views so lately expressed by the highest tribunal of the nation, we now hold that one claiming title to land by adverse possession for a period of 10 years as against all persons, should recognize the superior title of the United States Government, and seeking in good faith to quiet that title, may assert such adverse possession as against any person claiming to be the owner under a prior grant. Holding these views, we are of the opinion that the judgment of the Court below should be affirmed; and it is so ordered.”

We now find that the Circuit Court of Appeals for the Ninth Circuit follows *Boe v. Arnold* and in effect overrules both the *Tyee* cases as follows:

Eastern Oregon Land Company v. Brosnan et al., Circuit Court of Appeals, Ninth Circuit (Oregon Sept. 7, 1909), 173 Fed. Rep. 67.

“It is conceded that in each case the sole question arose out of the plea of the statute of limitations, which was sustained in the Court below. While the evidence went to show that in each case the defendants and their predecessors in interest held adversely to the plaintiff for the statutory period, it is stipulated that they did not hold against the government of the United States, but, on the contrary, during such possession, sought title to the land from the government.

“It does not seem to be questioned, certainly the general rule is well settled, that adverse possession of land, though held in admitted subordination to the title of the government, may nevertheless be adverse.

“It is true that at the time of the filing of the brief of the defendant in error, and at the time of the oral argument of these causes, the cases of *Beale v. Hite*, *Altschul v. O’Neill* and *Altschul v. Clark*, stood as the law of Oregon in respect to the character of adverse possession required by the Oregon statute; but by the very recent decision of the Supreme Court of that state made in the case of *Boe v. Arnold* (decided June 1, 1909), 102 Pac. 290, the previous cases of *Beale v. Hite*, *Altschul v. O’Neill*, and *Altschul v. Clark* were expressly overruled—the Court concluding its opinion in these words:

“‘In view of the authorities cited, and especially in the light of the views so lately expressed by the highest tribunal of the nation, we now hold that one claiming title to the land by adverse possession for a period of 10 years as against all persons, but recognizing the superior title of the United States government, and seeking in good faith to acquire that title, may assert such adverse possession as against any person claiming to be the owner under a prior grant.’

“This leaves the general rule above alluded to applicable to the present cases, with the necessary result, in view of the record, that the judgment in each case must be affirmed.

“Ordered accordingly.”

We readily concede that an early case decided by the Supreme Court of the United States is contra, as follows:

Redfield v. Parks, 132 U. S. 244 (Arkansas 1889).

The doctrine of this case is that the United States is not affected by the Statute of Limitations of any State, and hence title by adverse possession under the laws of any state cannot commence upon public lands against anyone who claims title until patent has been issued by the Government to the owner.

But the doctrine of this case has been very much amended if not overruled by the two cases of Iowa Railroad Land Company v. Blumer, 206 U. S. 482 and Missouri Land Company v. Weise, 208 U. S. 234.

The doctrine of the case of Iowa Railroad Land Company v. Blumer, *supra*, is that a title by adverse possession held by one who occupies the premises under color of title will run against a railway company which has complied with all the terms and conditions of a Congressional Land Grant as fixed by Congress after the acceptance of the grant by the State, even though there is a lack of final certification and issue of patent.

The Court says:

“We think the record discloses that for more than 10 years required by the Iowa statute to ripen said title, Carraher was in possession of the premises. He had planted a large number of trees; caused the lands to be cultivated; raised crops; had rented the lands to others and was understood to be claiming the ownership. The answer of plaintiff in error to this claim of

title is that Carraher was not in possession of the premises claiming title in good faith."

We submit that this is quite a serious qualification of the doctrine set forth in *Redfield v. Parks*, *supra*, and shows the tendency of the Courts to give a more liberal construction, which will enable a person in good faith to acquire a title by adverse possession.

We contend that there was a further qualification of the rule that adverse possession could not commence upon public lands until the issuance of a patent to one against whom the adverse possession is claimed, in the case of *Missouri Valley Land Company v. Weise* (Neb. 1908), 208 U. S. 234. The doctrine of this case is that where a grant had been made under the terms of which title was to pass to the railway company upon the filing of a map of definite location in aid of a branch railroad which road was not in existence at the time of the passage of the act constituting the grant and amendment therefor, was nevertheless a grant in *impraesenti*, such as would start in operation adverse possession.

The Court said at the close of its long opinion upon this case as follows:

"We are clearly of the opinion that the possession of Japp and his grantee was adverse in the strictest sense of the term and the acts of Weise in seeking to quiet title from the U. S. under the Act of 1887 with the view of removing a cloud upon his title was not an act of recognition or acknowledgment of a superior title, either in the United States or in the Sioux City

Company operating to interrupt the continuity of his adverse possession and in any event, cannot be held to have destroyed a title which had already become perfect by the expiration of the statutory period in Nebraska for quieting the legal title to the land by adverse possession."

We submit that the Supreme Court has made a large step in advance in giving liberal construction to the laws with a view to permitting the acquisition of title by adverse possession and we feel confident that the Circuit Court of Appeals for the 9th Circuit was fully justified in repealing the harsh and narrow rule of the older Oregon cases and the Tyee cases and adopting the liberal and rational rule of the Eastern Oregon Land Company v. Simpson (*supra*).

We may see by analogy how the Supreme Court has viewed in a much more liberal fashion the right of a locator on mineral ground to recover title as against a prior locator.

In the case of *Farrell v. Lockhart*, 210 U. S. 142 (Utah 1908), the Supreme Court held, to quote from the syllabus:

That the ground embraced in a mining location may become a part of the public domain so as to be subject to another location before the expiration of the statutory period for performing actual labor, if at the time when the second location is made, there has been an actual abandonment of the claim by the first locator.

In rendering the opinion in this case, the Court says:

“When it was found by the trial Court that the evidence offered tended to show that the South Mountain Lode Claim was located in August, 1900, *and that no work was ever done on said claim*, * * * Farrell made his location in August, 1901, a year after the South Mountain was located and five months before the expiration of the period when a statutory forfeiture of the South Mountain would have resulted. * * * to the contrary we are of the opinion that the proof that was so offered on behalf of the Divide tendered unexplained to show that the location of the South Mountain was not made in good faith and that the claim had actually been abandoned when Farrell made his location.”

We have cited this case by analogy to show how far the Supreme Court has gone in deciding in favor of a bona fide location as against a prior locator, who has abandoned his claim, even though the strict statutory period during which assessment work could be done had not yet passed at the time of the subsequent location.

Fuller v. Fletcher et al., 44 Fed. Rep. 34
(Rhode Island 1890).

“But such an instruction would be entirely inconsistent with the opinion of the Supreme Court in which it was distinctly affirmed that, when the other circumstances are very cogent and full, there is no absolute bar against the presumption of a grant within a period short of the Statute of Limitations; and also that when

a proprietary right has long been exercised, although the exclusive possession of the whole property to which the right is asserted may have been occasionally interrupted yet if the actual possession has been accompanied by other open acts of ownership and the interruptions did not impair the uses to which the possessor subjected the property, and for which it was chiefly valuable, they should not necessarily be held to defeat the presumption of the rightful origin of his claim to which the facts would otherwise lead."

120 U. S. 550, 552; 7 Sup. Ct. Rep. 667.

In concluding then this branch of our argument, are we not justified in saying that defendants could not possibly have had a fair and impartial trial upon the important question of their prescriptive title when it is demonstrated that the Court who tried the case was in error concerning the principle of law herein discussed? If any amount or kind of evidence could establish a prescriptive title, defendants respectfully submit that such a title has been proved in the case at bar. Shall they be deprived of valuable property to which they have such a title by the error of the trial Court?

V.

A FOREIGN CORPORATION UNDER THE LAWS OF ALASKA HAS A CLEAR RIGHT TO PLEAD THE STATUTE OF LIMITATIONS AND TO ESTABLISH A PRESCRIPTIVE TITLE TO MINING PROPERTY.

The case of *Winne v. S. W. Co.* (Iowa), 18 L. R. A. 524, relied upon by plaintiff in the Court below,

shows that the doctrine enunciated in that case, and in the New York cases cited therein, is based upon a special statute in each state inhibiting or denying the right of the plea to a foreign corporation not complying with the law.

There is no such statute in Alaska. The note reviewing the cases on the subject, found with the principal case, 18 L. R. A. 524, distinguishes the principle.

There was cited in the Court below, Sec. 15, page 147 of the code, but the very case cited by the code thereunder, *Anderson v. Baxter*, 4 Ore. 111, distinguishes the difference in actions *in personam* and *in rem*.

By the Alaska code it is expressly provided in Section 227, page 402, chapter 23, that service may be had upon a foreign corporation by publication, this being one of the two methods of bringing the corporation into Court. See

U. S. Express Co. v. Ware, 87 U. S. 20;

Kieffer v. Victor L. Co., 98 Pac. 877;

Arndt v. Griggs, 134 U. S. 316.

Section 366, page 225 of the code provides that upon death or removal of the statutory agent it is the duty of the clerk of the court to notify the corporation of such death or removal, and it is admitted in the evidence in this case that the defendant, Pacific Coal & Transportation Company had regularly appointed agents at Nome, and so far as the

record shows, no notice was ever given to the defendant of the death or removal of such agents.

Unless there can be shown some special statute governing Alaska, denying a foreign corporation within the District of Alaska the right to plead the Statute of Limitations then we contend that a foreign corporation has the same right to all defenses in Alaska as any other person may have, and no distinction is made under the law.

The only penalty for failure of a foreign corporation to comply with the law is a fine of twenty-five dollars per day and this could only be collected by the Government after the Government had notified the foreign corporation according to law, and we do not think plaintiff can produce any authority under wording of the Alaska code denying a foreign corporation any right which is given to a domestic corporation or an individual in setting up and maintaining any and all defense allowed under the law.

VI.

IT IS SHOWN BY THE EVIDENCE THAT THE PLAINTIFF WAS GUILTY OF LACHES TO SUCH A DEGREE AS IN EQUITY SHOULD BAR IT FROM ASSERTION OF TITLE TO THE GROUND IN CONTROVERSY.

The discussion of this proposition involves an examination of the other side of the question discussed under our title of adverse possession. In

order that the distinction may be apparent, we may state it this way. Under the title of adverse possession we have shown that defendants and their predecessors in interest have acquired title to the ground in controversy by positive and affirmative physical acts of possession. Under the title of laches we shall show that the plaintiff forfeited whatever title it might have acquired by reason of Jensen's location made January 3, 1899, through its failure to perform any of the many acts which would be evidence of its intention to claim the land in controversy. In other words, we propose to show that during the entire period while defendants were in the actual physical possession of the claim, plaintiff and its predecessors in interest pursued such a negative attitude with respect to the claim on their part as is tantamount in equity to an abandonment by them of whatever right they might originally have had over the conflict area of the claim.

If we were to sum up the facts upon which this proposition of law which we are about to discuss is based, it would require a re-statement of all the evidence to which we have thus far called attention in the brief. It seems to be admitted that the only acts of ownership performed by plaintiff and its predecessors in interest during the long period beginning with the original location of the ground and ending with the filing of the suit herein, were such few acts as we have already specified, that is:

- (a) The drilling of the holes, near the line in 1905;
- (b) Pipe lines, penstocks and ditch;
- (c) The mining operations carried on by plaintiff in 1910.

Of course, if we concede that plaintiff during all this time was in possession of the claim in controversy then the defense of laches would indeed fail. The learned Judge of the Court below as we view the case has fallen into the difficulty of reasoning in a circle somewhat in this fashion.

Since defendants could not in any event acquire title by adverse possession, because they were holding in subordination to the Government of the United States, therefore, defendants as a question of fact, must be considered as not having been in possession of the claim during all the years covered by the case.

Since defendants were not in possession, plaintiff is found to have been in possession and therefore plaintiff owed the defendants no duty whatsoever, and hence the defense of laches could not possibly arise in the case.

The mere mining operations of plaintiff in 1910 when plaintiff took possession of the ground in controversy ought not to justify us in saying that plaintiff was in possession of the ground during the time he is charged with laches and that therefore the defense of laches is not available.

The evidence of possession by defendants which we have heretofore in this brief summarized would seem to indicate that at all times during which defendants and their predecessors in interest were performing the acts of possession, the plaintiff was by its purely negative attitude building up the defense of laches which defendants are now seeking to avail themselves of.

In order that defendants might acquire a title by adverse possession it is necessary for them to show that they have kept and retained open, notorious and uninterrupted possession of the ground in controversy for the statutory period required by the Code of Alaska.

Under the defense of laches, it would have been possible for defendants to have acquired an equitable possessory title by showing the same acts of adverse possession for a less period than the statutory period of limitation, providing it was shown that the plaintiff failed to assert its right when it was in duty bound so to do. And in this regard we must always remember that the ground in controversy was mining ground and that plaintiff in order to hold it, was compelled to do assessment work each year.

There were many acts which plaintiff might have performed evidencing its determination upon its part to assert its title to the ground, but the record fails to show that any of these things were done, but on the other hand, the record does show in

effect that plaintiff had abandoned the ground in controversy.

“Laches in a general sense is the neglect to do what in law should have been done for an unreasonable and unexplained length of time under circumstances permitting diligence. More specifically it is inexcusable delay in asserting a right. Strictly speaking laches implies something more than mere lapse of time. It requires some actual or presumable change of circumstances rendering it inequitable to grant relief.”

Cyc. 16, p. 152.

The change of circumstances shown by the evidence in this case is that defendants and their predecessors in interest and the defendant lessee, McCumber, changed their circumstances to the extent of putting improvements on the property and doing work which involved the expenditure of money, while plaintiff did absolutely nothing, except the meager acts to which we have called attention.

“While the Courts have thus discussed the effect of delay alone, unattended by other circumstances, it is quite evident that there can be few, if any cases where there has been considerable delay, which present absolutely no other circumstances that might affect the question.”

Cyc., Vol. 16, p. 153.

How much stronger then, is a case which presents this situation; the defendants are shown to have held adverse possession to the property in controversy for a period of over three years in excess of the statutory period of limitation.

“While it is said that lapse of time, uninfluenced by a Statute of Limitation will not bar the divestiture of a legal title in favor of the equitable owner, long adverse possession operates as a bar to the assertion of title in equity as well as at law.”

Cyc., Vol. 16, p. 154.

“The speculative character of the property involved is an important element in considering the effect of delay in assuming a right thereto, and more than ordinary promptness must be displayed to avoid the charge of laches in such case. This is but one phase of a broader principle that one may not withhold his claim awaiting the outcome of an enterprise and then after a decided turn has taken place, assert or renounce his interest in accordance with the result.”

Cyc., Vol. 161.

“The most frequent case of laches consisting of delay working prejudice to defendants through change in circumstances is where plaintiff has slept on his rights and permitted defendants to make valuable improvements on the property in controversy or to make large expenditures in reliance on his title thereto.”

Cyc., Vol. 16, p. 162.

Sage v. Winona & St. P. R. Co. et al. (Circuit Court of Appeals, Oct. 2, 1893), 58 Fed. Rep. 293.

“There are obvious reasons why the holder of the legal and equitable title to lands, who is in possession of the same, should not be confronted with the plea of laches when he files a bill to cancel some void or invalid conveyance

which operates as a cloud upon his title. Possession of the premises by the true owner is good and sufficient notice to the world of his rights therein, by reason of which third parties need not be prejudiced by any dealings they may have with the holder of the invalid conveyance, while the existence of the cloud is a continuing injury like a public nuisance. Under such circumstances, no harm can result in holding that no period of delay on the part of the owner in asserting his right to have the cloud removed will bar him of his remedy. But the case is far different when the person filing such a bill is out of possession, or, if not in actual possession, is the holder of a record title that is without any apparent flaw or defect. In such cases the doctrine that neither laches nor statutes of limitation can be invoked as a defense to a bill filed to remove a cloud upon a title has no just application, and, if tolerated, would frequently lead to gross injustice."

We shall continue the discussion of this phase of defendants' case under the head of estoppel.

VII.

PLAINTIFF WAS CLOSELY ESTOPPED BY ITS OWN ACTS FROM CLAIMING TITLE TO THE GROUND IN CONTROVERSY.

The facts so far as this portion of the brief is concerned are pleaded quite fully in the 7th affirmative defense found in the answer of both the defendants. The lower Court refused to admit the testimony offered in proof of the defense of estoppel, but for the purpose of discussion of the

question, we shall assume that the proof was accepted. In other words, we shall discuss the errors of the Court in this regard by grouping the errors under this one subdivision of our brief.

The particular errors complained of are found in Assignment of Errors Nos. 29, 30, 33, 34, 44, 45, 46, 47, 50 and 51. From the pleadings, and we refer to the pleadings in order that the facts may be presented in the shortest possible way, we find that three men, Lindeberg, Brynetson and Lindblom, were and are the real owners of the Pioneer Mining Company and also were the owners of the Moonlight Springs Water Company. The Moonlight Springs Water Company was during the year 1903 the owner of the mining claim known as the Moonlight Claim and also referred to in this brief and in the transcript as the Lyng Claim.

The Lyng Claim adjoins the Grant Claim on the west. The Moonlight Springs Water Company was engaged in selling water to the town of Nome conveying the same from a natural spring on said claim and near to the west side of the claim of defendants.

On the 18th day of May, 1903, the Moonlight Springs Water Company composed of substantially the same men who owned the Pioneer Mining Company brought a suit against George Doverspike, C. T. Howard, Crawford and Williams, who as the evidence shows were the lessees of the Pacific Coal & Transportation Company under a written lease

executed in the fall of 1902, which lease was upon the land and premises known as the Grant Claim.

It appears from the allegations of the complaint that the said lessees were working and mining the Grant Claim and extracting gold therefrom, and they were working the westerly part of said claim, near the easterly end of the Moonlight Claim and within the boundaries of the ground in controversy. The purpose of the suit brought by the Moonlight Springs Water Company was to enjoin the said lessees from carrying on their mining operations on the ground for the reasons alleged, that the said lessees were fouling the waters of the Moonlight Springs, the source from which the Moonlight Water Company obtained its supply of water for Nome.

It appears that an answer was filed by lessees setting up title of the Pacific Coal & Transportation Company to the land in controversy and setting forth the lease.

A temporary restraining order was issued on behalf of the plaintiff in the action and against the lessees but subsequently on a hearing on the merits, the injunction was dissolved. Thereafter, the lessees brought an action against the said Lindeberg, Lindblom and Brynetson. The action was tried and on the 17th day of April, 1899, a judgment was obtained against the defendants for the sum of \$2500 and the judgment was paid in the month of October, 1909.

During all the time that this litigation was pending, the said persons constituting the Pioneer Mining Company never asserted any claim or title to the land in controversy, and never claimed or asserted ownership, possession or title thereto, but during all the time indirectly recognized defendant, the Pacific Coal & Transportation Company and its lessees as being the owners in possession and entitled to the possession of said lands.

Transcript, pages 36 to 42.

These facts constitute one line of estoppel in pais which the defendants were prevented under the rulings of the Court from proving. In a few words the situation is this: The same gentlemen who are practically the Pioneer Mining Company are also practically the Moonlight Water Company. Certain persons are working the ground in controversy in this action, and indirectly thereby fouling the springs on the property of these men.

They bring a suit to enjoin the miners from fouling their springs. Here was a splendid chance to assert and prove their ownership to the ground in controversy, and equity would seem to require them at that time to assert their title. We find that upon the other hand they do not bring an action in ejectment; that they do not succeed in enjoining the men who are working upon what they now claim to be their own ground; but upon the other hand, we do find that a judgment goes against them for damages.

It is the merest sham to contend that the corporation plaintiff is a different corporation from the Moonlight Springs Water Company, and hence that the Moonlight Springs Water Company was not bound to assert a title, which it did not technically have. Equity will look through the form of the transaction. We find that the plaintiff should have asserted its title to the ground when all of its stockholders knew that such an assertion of title would have prevented the mining operations which produced the alleged fouling of the springs.

The knowledge of the three men as to the facts was the knowledge of both the corporations because the same men owned both corporations. If they owned the ground on which the mining was taking place why did they not stop the trespassing and thus protect their springs in the most effective way? Were not the lessees and owners of the ground in conflict misled by the acts of plaintiff in not asserting its title to the ground when it should have done so?

**WE NOW TAKE UP SOME OTHER LINES OF ESTOPPEL IN PAIS
AS PRESENTED BY THE ASSIGNMENT OF ERRORS.**

ASSIGNMENT OF ERROR No. 33.

We contend that the Court erred in not permitting the witness Tom D. Jensen to testify that he had an interest in Claim No. 1 Bench Moonlight claimed by the plaintiff in this action.

The Court refused to permit the witness Tom D. Jensen to testify that he was an owner of an equitable interest to the extent of one-half of the Moonlight Claim under a special arrangement with his father who was the locator of the said claim. The facts show that when the deed was passed from the elder Jensen to his grantee, Tom Jensen acted as attorney in fact and executed the instrument (Trans. p. 236). If it were true that Tom Jensen was an equitable owner of a one-half interest, then that fact was very pertinent to the issues in the case. Our contention is that Tom Jensen as equitable owner of a one-half interest in the Moonlight Claim stood by with full knowledge of the facts, and never contended in any way that the Grant Claim conflicted with the Moonlight Claim. We must remember that the elder Jensen was not produced as a witness in the case, except by deposition and that the defendants had no opportunity for a thorough cross-examination.

Tom Jensen, the son of the elder Jensen, who was attorney in fact, is not permitted to testify that he, as the owner of a one-half interest in the claim, never contended that there was a conflict between the Moonlight Claim and the Grant Location. We submit that this serious error of the Court prevented defendants from proving the details of this particular line of estoppel.

ASSIGNMENT OF ERROR No. 50.

The Court refused to permit the witness M. D. McCumber to testify that the plaintiff tried to buy his title to the ground in controversy prior to the institution of the suit. We are at a loss to understand why this testimony under the pleadings in the case and the issues as defined was not pertinent and proper. This is not a case where the Court is refusing to permit parties litigant to offer testimony as to a proposed compromise of their litigation. McCumber was a lessee in possession of the ground in controversy under a written lease from the corporation defendant. The plaintiff offers to buy out his title. If that is a fact and could be shown to be a fact, we submit that it is very important evidence going to prove and support a distinct line of estoppel in pais as against the plaintiff.

The error of the lower Court is more serious when we remember that plaintiff brings this action upon the theory that it was in possession of the ground at the time of the commencement of the action; and that the defendants are prevented by the rulings of the Court from proving that prior to the 7th day of November, 1910, the plaintiff offered to buy from M. D. McCumber the ground in controversy.

“If a person by his conduct induces another to believe in the existence of a particular state of facts and the other acts thereto to his prejudice, the former is estopped as against the latter to deny that that state of facts does in truth exist.”

Cyc., Vol. 16, p. 680.

“Where a person stands by and sees another about to commit or in the course of committing an act infringing upon his rights, and fails to assert his title or right, he will be estopped afterward to assert it; but it must appear that it was his duty to speak and that his silence or passive conduct actually misled the other to his prejudice.”

Cyc., Vol. 16, p. 761.

VIII.

WE SHALL NOW DISCUSS MOST OF THE REMAINING ASSIGNMENTS OF ERROR WHICH HAVE NOT ALREADY BEEN GROUPED UNDER THE PROPOSITIONS HERETOFORE CONTENDED FOR IN THIS BRIEF.

ASSIGNMENT OF ERROR No 6.

The Court refused to permit Jafet Lindeberg to testify as to why he did not proceed to get a patent on the Moonlight Claim. The Court also refused to permit him to testify on cross-examination as to whether or not he knew that if he applied for a patent he would have to litigate the question of adverse title in the U. S. Land Office. We are at a loss to understand why the lower Court in view of the pleadings in the case confined the testimony so far as defendants were concerned within such narrow limits. The procuring of a patent to the land in controversy by plaintiff would not only have been one of the methods of asserting ownership, but the procuring of the patent itself in the event

that no adverse ownership was asserted would have intercepted the running of the Statute of Limitations.

There is no evidence introduced showing the doing of actual assessment work upon the Moonlight Claim by plaintiff and the defendants are now prevented from showing out of the mouth of the president of the corporation plaintiff, that he did not proceed to get a patent to the ground in controversy, because the corporation would have been met by an adverse claim in the U. S. Land Office.

ASSIGNMENTS OF ERROR NO. 7 AND NO. 8.

The Court erred in not permitting defendants to show that the plaintiff was the owner of the Jerome Fraction. An examination of the map (defendants' Exhibit No. 9) will show that the Jerome Fraction lay immediately to the south of the Moonlight Claim. The obvious purpose of the question by defendants was to show that the mining operations carried on by plaintiff in or near the southwest corner of the Grant Claim, were in fact mining operations upon the Jerome Fraction, claimed by the plaintiff. One of the important facts in the case at bar is that the plaintiff owned mining ground both to the west and south of the ground in controversy. In view of the fact that plaintiff is contending that the holes drilled near the southwest line of the Grant Claim and the mining operations of 1910 were a disturbance of the adverse possession of de-

fendants, surely defendants should have been permitted to show that the plaintiff was in fact an owner of the ground surrounding the ground in controversy and that its mining operations were performed for the Jerome Fraction title and not for the title of the claim at bar.

The Court also refused as is shown by Assignment of Error No. 8 to permit Stevenson, the representative of the corporation plaintiff as a witness to testify on cross-examination as to whether or not he signed an affidavit swearing to the work that was done on the Jerome Fraction in 1903. Defendants proposed to prove that the work done near the line of the Grant Location, was in fact done for the Jerome Fraction.

We fail to understand why this is not pertinent and relevant testimony since the particular question under investigation was as to whether or not plaintiff had ever exercised any physical possession over the ground in controversy. We cannot reconcile this ruling with any other theory than that the lower Court was of the opinion that the question of adverse possession and the continuity of the possession and the interruption of the possession was a question entirely outside of the case, because the defendants were holding possession while recognizing the paramount title of the United States.

ASSIGNMENT OF ERROR No. 9.

The Court refused to permit Mr. Stevenson, representative of the corporation plaintiff, to answer the question as to whether or not in 1909 the Pioneer Mining Company tried to buy the ground in controversy. We have already discussed the other side of this error when the Court refused to permit Mr. McCumber to testify to practically the same set of facts. It if were true that Stevenson, as the representative of the corporation plaintiff did try to buy the ground, we are utterly at a loss to understand why such an act by the plaintiff corporation would not be the strongest evidence of recognition by them of the fact that they did not own the ground in controversy.

We cannot but believe that the refusal of the lower Court to permit evidence of this character was seriously prejudicial to the defendants' side of the case and prevented defendants from having a fair and impartial trial.

ASSIGNMENT OF ERROR No. 11.

The Court permitted the witness Arthur Gibson in testifying to the position of the stakes of the Moonlight Claim, to state what one, C. L. Spanggard, had told him concerning the stakes and corners of the claim.

In order that the seriousness of this error may be self-evident, we call particular attention to the

testimony of the witnesses, on pages 326-327 of the transcript as follows:

“Q. Old Willow Stake, state whether or not that was identified by anyone?”

(After objection to the question had been overruled and exception taken and allowed, the witness testified as follows:)

“A. Identified by Mr. Spanggard.

“Q. Identified as what?

“A. As the southwest corner stake of Bench No. 1.

“Q. Do you know Mr. C. L. Spanggard?

“A. I do.

“Q. State whether or not any of those stakes found at that point were identified by anyone as being the Bench No. 1 Moonlight Stakes, yes or no?

“A. Yes.

“Q. Who identified it and what did he identify it as?”

(Objection to this question was overruled and exception taken and allowed.)

“A. Mr. C. L. Spanggard said that one—”

(Here objection was made and the question restated.)

“Q. What did he identify the stake as; I don't care what he said, what did he identify them as?”

(Objection again made and overruled and exception taken.)

“A. As the corner of—the northeast corner of Bench No. 1 Moonlight.

“Q. Did he identify any other corner at that place, of any other claim?

“A. Yes.”

We also call attention to certain excerpts from the evidence on page 328 of the transcript:

“Q. State whether or not that point was identified by anybody as a corner of Bench No. 1 Moonlight and if so by whom?

“A. *It was.*

“Q. By whom?”

(Objection made and overruled and exception taken.)

“A. By C. L. Spanggard.

“A. Mr. C. L. Spanggard identified it as the northwest corner of Bench No. 1 Moonlight.”

On page 329 of the transcript we find more of this kind of evidence as follows:

“Q. Who identified it?”

(Objection made and overruled and exception taken.)

“A. Mr. C. L. Spanggard.”

Even if we concede that under certain circumstances hearsay evidence of this kind might be admitted and we further concede that hearsay evidence under certain circumstances would not be prejudicial error, we earnestly contend that under the peculiar circumstances of this case, the admission of evidence of this character, where absolutely no chance is given to the defendants to cross-ex-

amine Mr. Spanggard, was most serious and prejudicial error.

Mr. Spanggard did not appear as a witness in the case. The facts show that he was one of the witnesses to both Jensen Locations (Trans. p. 227). The testimony shows that Mr. Grant was dead and could not be produced. Spanggard helped presumably to locate the Jensen Claim. Mr. Gibson was an exceedingly important witness in the case because it was the maps made by him which undoubtedly influenced the mind of the Court as to the location of the Moonlight Claim.

It was not contended that Mr. Gibson was present when either the Grant Claim or the Moonlight Claim or No. 6, Goodluck, were located. He therefore had no original knowledge as to the position of the boundary stakes except such knowledge as could be obtained from an examination of the stakes on the ground made years after they were placed.

Spanggard therefore who does not appear as a witness in the case, and whose testimony might or might not be of very serious importance to defendants speaks through the prejudiced mouth of Mr. Gibson, and the defendants are foreclosed of their right to cross-examine Spanggard concerning the statement which Mr. Gibson says that he made.

The fact that the word "identified" is used in the question put by the learned counsel for plaintiff, does not in any way cover up or conceal the

size of the error which has resulted so seriously in depriving defendants of their property.

When Spanggard, speaking through the mouth of Mr. Gibson, identifies the stakes which constitute the corners of the claim, he testifies that they are the stakes. Mr. Gibson said that Mr. Spanggard told him those were the stakes. Spanggard must have told him by the use of language symbols that they were the stakes. The process of identification was a process by which Spanggard either did or did not tell Gibson where the stakes were. If he told him, it is the clearest case on record of the worst kind of hearsay evidence, and every principle of law cries out against permitting a witness to testify through the mouth of another on an important issue of fact, such as on the question of locating these stakes. It is perfectly apparent to the Court that Mr. Gibson's map is made up to a great extent upon the basis of what Spanggard told him as to the location of the stakes.

We trust that we are not exaggerating the situation when we say that the most important foundation upon which the case of plaintiff rests is the testimony of Mr. Gibson who was at least so far as the record shows, a very hostile or adverse witness to the defendants. In fact, there is some suggestion in the record that Mr. Gibson was a highly partisan witness in behalf of plaintiff. Perhaps we should not at this point complain on that score, but at least we have the right to call attention to the fact that

if the testimony of Spanggard is to filter down to us through the testimony of Mr. Gibson, then indeed the defendants are placed in a position of very serious disadvantage. If Mr. Gibson had been a strictly impartial and unprejudiced witness, there might be some chance to suggest that the defendants were not injured by the method in which the testimony of Spanggard got into the record, but in view of the testimony of Mr. Gibson, the maps drawn by him and his excess of partisanship in the case, we submit that defendants have been deprived of a substantial right by the serious error of the Court in permitting Gibson to locate the stakes of the Moonlight Claim by the hand and with the mouth of the absent Spanggard.

We are curious to know what Mr. Spanggard might have said if upon the stand he was confronted with the Jensen Location on Bench No. 6 and the Jensen Location of the Moonlight Claim, and asked whether or not at the time, Jensen made his location, he was overlapping the Lyng Claim as the decree in the case at bar finds.

We might also like to have asked Mr. Spanggard as to what he knew about the lines of the Grant Claim, as well as the lines of the Moonlight Claim, but since we are deprived of the right of cross-examination, we submit that we were also deprived of a fair trial if this error of the Court is permitted to stand.

ASSIGNMENT OF ERROR No. 12.

The Court erred in permitting the plaintiff during the trial to so amend its complaint as to change its description of the Moonlight Claim. This is not the ordinary amendment where an erroneous description has been made, but this is an amendment which is permitted in order that plaintiff might locate its floating claim to fit in with the testimony of plaintiff and the alleged facts of the case.

The result of this amendment was to permit plaintiff to change its entire theory as to the location of the Moonlight Claim with the net result that the Moonlight Claim as fixed by this description, overlaps a portion of the Bob Lyng Claim. Defendants prepared their case for trial and tried it upon the theory that plaintiff was contending that the Moonlight Claim lay entirely to the east of the Lyng Claim.

Andrew Jensen had testified again and again that his location was to the east of the Lyng Claim, starting with the Lyng Claim as his initial stake (Trans. pp. 213, 214, 218). The amendment, therefore, came as a surprise to the defendants and should not have been permitted, because plaintiff must have known when suit was brought where this claim was located and the permission to change the description was not an amendment allowed for the mere purpose of correcting an error but the result of the amendment was that plaintiff was permitted to change its entire theory of the case.

ASSIGNMENT OF ERROR No. 14.

The Court would not permit the defendants to ask Mr. Gibson on cross-examination the question as to whether he ever made any other map or blue print of the ground in controversy except Exhibit A. Again we are at a loss to understand the theory upon which this ruling was made. As we have before stated, Gibson was a very important witness for the plaintiff. He was making out the lines of a claim, at the staking of which he was not present. He was making a map which seems to have been used largely as the basis of the decision, yet the defendants are deprived of the right to cross-examine him as to whether or not he had long previously made another map which might have conflicted with the map introduced in evidence.

For the same reason it would seem to have been a fair question put to Gibson as to whether or not it was a fact that the Lyng and Moonlight Claims (plaintiff's Exhibit A), were not identical with the same claims on another map. If the other map was made by Gibson, then the error becomes more apparent, but we ask the question as to why defendants were foreclosed from the right of cross-examination on these points.

ASSIGNMENT OF ERRORS No. 16 AND No. 17.

When the witness, Arthur Gibson, was on the stand he was shown a map (defendants' Exhibit No. 7), and was asked if it was not a fact that the

Bob Lyng and Moonlight Claims on the exhibit were identical with the Bob Lyng and Moonlight Claims on a certain blue print (defendants' Exhibit No. 8 for identification), which defendants proposed to offer in evidence.

Counsel for defendants stated that he offered the blue print for the purpose of showing that so far as the Bob Lyng and Moonlight Claims were concerned the blue print was an exact copy of defendants' Exhibit No. 7. The Court refused to consider the testimony in that point and refused to admit the proposed blue print in evidence. In this regard we again call particular attention to the fact that the witness Arthur Gibson was adverse to defendants; that his surveys and maps seemed to the Court very important, and we submit that in so far as it was suggested that he had previously made a map for the Pioneer Mining Company showing the boundaries of the Bob Lyng Claim as they were set forth in the proposed blue print; that under these circumstances the widest latitude should have been given on cross-examination (Trans. p. 367).

Regarding Assignment of Errors No. 17 when the witness Dan A. Jones was upon the stand he testified that he made a certain map in November, 1911, showing Bench Claim No. 1, Grant Claim No. 2, East Fork, Whats Left Fraction and the line of the Moonlight or Lyng Claim; that they were all made from actual surveys by him and that the claims

were correctly depicted on the map with reference to each other. Defendants offered the said map in evidence, but the Court rejected the same and would not even permit the map to be offered in evidence for the purposes of illustration.

Trans. pp. 417-418.

The said map was marked for identification defendants' Exhibit No. 12. Jones testified that he was a civil engineer and U. S. Deputy Mineral Surveyor.

Trans. p. 393.

We confess again that we are at a loss to understand why a map made from an actual survey of the ground by the witness should not have been admitted in evidence even though certain claims on the map were made from a map sworn to by the witness Arthur Gibson and drawn from defendants' Exhibit No. 7.

It cannot be that Mr. Gibson's maps are the only ones that should be considered by the Court; nor does the record show such fairness and impartiality on the part of Mr. Gibson as to entitle his maps and surveys to pre-eminent consideration at the hands of the Court. For aught that appears Jones was as skillful in the matter of surveys as Gibson. We admit that it was within the province of the learned Judge of the Court below to believe Mr. Gibson and to refuse to believe Mr. Jones, but we cannot understand how the proper basis for such belief or

lack of belief could be laid by the defendants, unless they were permitted to present all of their evidence upon the question.

It should be repeated that Mr. Jones was testifying from actual surveys made upon the ground at least as to the claims which we have above specified, while as we have shown Mr. Gibson was testifying as to hearsay evidence concerning the location of the stakes. We submit that the failure to receive these two exhibits in evidence was a serious error prejudicial to the rights of the defendants.

ASSIGNMENT OF ERROR NO. 31.

Under ordinary circumstances perhaps we should not have the right to object to the failure of the Court to receive in evidence a letter written by Tom D. Jensen March 28, 1911, to Mr. Gilmore, one of the attorneys for defendants.

We do not question in the least that the plaintiff could not be bound by a letter written by Tom Jensen to Mr. Gilmore which the plaintiff presumably never saw, and of which it did not know. In view of the facts however as clearly shown under our discussion of the refusal of the Court to grant a continuance for the purpose of taking the deposition of Andrew Jensen, we submit that the imposition on defendants of a technical and narrow rule, in view of the fact that they were denied the right to go into the contents of the letter on the cross-examination

of Andrew Jensen, has deprived the defendants of any chance which they may have had of combating the testimony of Andrew Jensen, under the strict rules of evidence.

ASSIGNMENT OF ERROR No. 32.

The Court refused to permit the defendants to introduce in evidence defendants' Exhibit No. 51 (for identification). In the deposition of Tom D. Jensen he was shown a certain pencil sketch which he testified was to the best of his belief in the handwriting of his father as follows:

"Please examine the instrument I hand you, marked Exhibit 'A' at the top, and state if you know what that is.

"A. That is the drawing I received from my father. (Continuing): I received it in his letter, in that letter.

"Q. State whether or not, Tom, that is your father's handwriting.

"A. I think it is.

"Q. Are you familiar with his handwriting?

"A. Yes, I believe it is.

"Q. State whether or not that is the drawing enclosed in the letter received from him.

"A. It is.

"Q. State whether or not it was received by you in one of the letters you have previously testified to.

"A. It was."

Trans. p. 656.

The testimony while not absolutely conclusive tends to establish the fact that the pencil sketch was the handiwork of Andrew Jensen himself. The sketch therefore becomes a solemn statement in writing of the witness as to the location of his Moonlight Claim Bench No. 1. In fact an examination of the sketch shows that he calls it "My Bench on Moonlight" (Trans. p. 658).

Defendants do not contend that Andrew Jensen is a skilled surveyor or that his map shows accurately the positions of the various claims which we have read about in the transcript in the case, but the sketch does show and this is a significant circumstance that Andrew Jensen puts his claim to the south and east of the Grant Claim. It will be noticed from the sketch that he approximately locates Anvil Mountain and the Grant Claim below it while outside of the Grant Claim and away from the mountain, he places his claim. In other words he places his claim entirely to the east and south of the Lyng or Moonlight Claim and he also gives us the approximate position of the Moonlight springs (Exhibit No. 51 for Identification, Trans. p. 658).

Our contention is that while the location of these physical facts and of the claims is not absolutely correct, the relation which these various objects and the claims bear one to the other, as the picture existed at the time he drew the sketch in the mind of Andrew Jensen, is exceedingly significant and important.

It must be remembered that the decree in the case at bar following the amendment to the complaint, made over the objection of defendants, places the Jensen location in absolute conflict with the Lyng Claim and overlapping the eastern part of it.

Here we have a sketch drawn by the man who made the location which places his location outside of both the Grant Claim and the Lyng Claim and not in conflict with either of them. It is the theory of the defendants shown by such evidence as this, that the Jensen location was not accurately determined by Jensen himself and was more or less of a floating location intended to be placed upon any open ground that might lie between the eastern line of Lyng Claim and the western line of the Carlson Claim.

Here we have the locator himself (and a most important witness) presenting to the Court a pencil sketch substantiating defendants' theory in that regard, but defendants are deprived of the right to introduce the sketch in evidence and necessarily the defendants are deprived of the right to have the Court consider the same in rendering judgment in the case.

We submit that this was a most grievous error which closed the door upon defendants' case so far as the lower Court was concerned and prevented them from having a fair and impartial trial.

IX.

THE MOONLIGHT BENCH CLAIM NO. 1 AS ORIGINALLY LOCATED BY JENSEN, CONFLICTED WITH NEITHER THE GRANT LOCATION, NOR THE LYG CLAIM, AND THE DECREE WHICH PLACES IT OVER BOTH THESE CLAIMS, IS UNSUPPORTED BY THE EVIDENCE.

Andrew Jensen was the locator of Moonlight Bench No. 1 and must have known the physical situation of the claim. He knew where the Bob Lyng Claim was located. He was a witness to the location of the Grant Claim (Trans. p. 228). Of all persons on earth he must have known whether or not his Moonlight Bench conflicted with either the Grant or the Lyng Claims. He testified directly and with specific reiterations that there was no conflict between his location and the Lyng Claim.

“Q. Please state whether or not at all the times you were the owner of said Bench No. 1 Moonlight Claim you ever at any time claimed that the exterior boundaries of said Bench No. 1 Moonlight embraced or included any of the ground of the Bob Lyng or Moonlight Claim, or the said Grant Claim, as shown on Exhibit ‘C’ to this deposition.

“A. I never did.”

Trans. p. 218.

“Q. Did the Grant Claim at any time, to your knowledge, overlap the No. 1 Bench Moonlight, if so, state when you first discovered such overlap, and to what extent it overlapped?

“A. It did not to my knowledge. I never discovered it because I left in the fall of 1900.”

Trans. p. 221.

“When I staked No. 1 Bench Moonlight, Robert Lyng’s stakes on his Moonlight Claim were visible and the location stakes of the Nelson on the east. When I saw the stake on No. 6 Good Luck, Robert Lyng’s on Moonlight were visible; I also saw the stakes of No. 1 Below on Anvil Creek belonging to Lindeberg. When the Grant Claim was staked, all the stakes of No. 6 below Good Luck and also the upper stakes of Robert Lyng’s on Moonlight and the two upper states of Bench No. 1 on Moonlight owned by me were visible. At the time I staked Bench No. 1 Moonlight, as far as I remember there was six stakes marking the Moonlight or Bob Lyng’s claim.”

Trans. p. 224.

“At the time I staked my two claims No. 6 Good Luck and No. 1 Bench Moonlight, their exterior boundaries as marked by me on the ground, did not in any way conflict with the Bob Lyng or Moonlight Claim.”

Trans. p. 214.

“My Bench Claim No. 1 Moonlight joined the Bob Lyng or Moonlight Claim on the east and extended along the easterly side of Robert Lyng’s claim and further up towards Anvil Mountain than Lyng’s claim, and it extended east from Lyng’s claim towards the Nelson claim.”

Trans. p. 213.

Furthermore the map (Defendants' Exhibit 51 for Identification) to which we have already referred, is a written admission by the witness Andrew Jensen to the effect that his original location did not overlap the Lyng Claim.

We must remember that there is a portion of the Grant Claim not in dispute in the action. But we do find that it is the portion of both the Grant and Jensen Claims, lying closest to the Lyng Claim about which the controversy turns. And yet notwithstanding the clear testimony of Jensen, we find the decree in the case at bar places the claim of plaintiff over and in direct conflict with the Lyng Claim.

Robert Lyng who made his location in November, 1898, and who testified that his east stakes had not been moved at the time he gave his deposition September 19, 1911, must have known where his claim was situated. He must have known also the situation of the Grant Claim, the initial stake of which was identical with his (Trans. pp. 507, 508). Lyng testified that the Grant Claim did not overlap his (Trans. pp. 521, 522).

We may then conclude that the only justification for the overlapping of the Lyng Claim by the Jensen location as set forth in the decree, must be found in the deductions of the surveyor Gibson. It may be asked why, the defendants who do not own the

Lyng Claim are prejudiced by a decree, which takes in ground included within the Lyng Claim boundaries. The defendants' interest in the scope of the decree arises not because of the loss of the Lyng Claim, which they do not own, but because a floating location is placed by the lower Court over their property. The floating character of the location is shown by evidence that its corner stakes are located on hearsay evidence, and its western line is located, contrary to all the direct evidence in the case. While Jensen was making his location, he could see plainly the Robert Lyng stakes (Trans. p. 224). He intended to keep outside the stakes of Lyng's location. He could see the six stakes of Lyng's Claim (Trans. p. 224) and he kept away from them. Where is the evidence in the case at bar which conflicts with Jensen's statement? And yet because of a "theory" of the Surveyor Gibson, the complaint is amended, and the floating location is anchored over a portion of the original Lyng Location. Although the Grant Location was plainly marked on the ground, and was known to Lyng, Jensen and the other pioneers of that section, and although defendants and their predecessors have held possession of the ground, they are now to be dispossessed by a decree, which contrary to the evidence, locates a claim in such a way as to conflict with their location. We submit that Lyng and Jensen must have known where their respective claims were located, and that the decree is in hopeless conflict with the

direct evidence in the case, and hence is not sustained by the evidence.

CONCLUSION.

A very careful reading of the voluminous record in this case has impressed us with the strenuous efforts made by plaintiff to overcome the mass of testimony introduced by defendants as to the character and extent of their possession. One obvious example of plaintiff's efforts in this regard, is shown in the struggle to prevent a jury trial on the question of ownership, where a jury gathered from a population engaged principally in mining would be liable to look with favor upon an ownership built up by years of toil, struggle and expense. At the close of our brief, counsel cannot help but feel how inadequately after all he has shown the strength of appellants' position as it stands forth from every page of the transcript. It is only by a reading of all the testimony and proceedings in the Court below that we can gain an adequate conception of the wrong which defendants will suffer if the judgment shall be affirmed. Counsel realizes how serious is his responsibility in the attempt herein made to seek a redress of the wrong which the decree at bar visits upon his clients—a responsibility heightened by the fact that counsel knows the strength of appellants' case, but fears that he may not have made the exposition thereof complete.

Counsel feels certain however that the testimony as to defendants' ownership of the claim in controversy is so clear and strong that no inadequacy in counsel's presentation of the case, can affect the strength of defendants' position.

Dated, San Francisco,
October 16, 1912.

Respectfully submitted,

ALBERT H. ELLIOT,
WM. A. GILMORE,
GEO. B. GRIGSBY,
ELWOOD BRUNER,
Attorneys for Appellants.

IN THE
United States Circuit Court of Appeals
 FOR THE
 NINTH CIRCUIT.

THE PACIFIC COAL AND TRANS- PORTATION COMPANY (a cor- poration), and M. D. McCUMBER, <div style="text-align: right;"><i>Appellants,</i></div>	}	No. 2150
vs.		
PIONEER MINING COMPANY (a corporation), <div style="text-align: right;"><i>Appellee.</i></div>	}	

BRIEF FOR APPELLEE.

STATEMENT OF THE CASE.

This is a suit to quiet title brought on November 7th, 1910, under Sec. 475 of the Codes of Alaska, to quiet title and to determine adverse claims to that certain placer mining claim situate in the Cape Nome Recording District, District of Alaska, known as Bench Claim No. 1 Moonlight Creek near Moonlight springs.

The complaint (Tr., p. 1) in substance alleges that plaintiff is now and for a long time hitherto has been the owner of that certain placer mining claim lying and being in the Cape Nome Recording District, District of Alaska, and known as Bench No. 1 Moonlight Creek near Moonlight Springs, and described therein by metes and bounds and courses and distances according to Survey No. 608.

That defendants and each of them claim and assert an interest in said premises, adverse to plaintiff, the extent and nature of which adverse claims are to plaintiff unknown. That the claims of said defendant and each of them are without any right whatsoever; that the value of the property is Ten thousand dollars; and prays that the defendants be forever restrained and enjoined from asserting any claim whatsoever in and to said premises adverse to plaintiff, etc.

To this complaint the defendant, the Pacific Coal and Transportation Company, and the defendant, M. D. McCumber, answered separately (Tr., p. 9). The answers are not in the record but it appears from the Opinion of the trial Judge that they were filed (Tr., p. 9), and in substance were that the answers of each of said defendants are identical except that the defendant McCumber is alleged to be a lessee under a lease from the defendant, the Pacific Coal and Transportation Company. Both answers deny all of the material allegations of the complaint and specifically deny the possession of plaintiff.

Then follow four separate and affirmative defenses.

In the first affirmative answer of the defendant corporation, the said defendant alleges that it is the owner of the Moonlight or Grant claim under and by virtue of a valid location, describing the same by metes and bounds and courses and distances, and alleges that it and its grantors and predecessors in interest, are the owners in fee of the whole of said claim, having entered in the exclusive, open and notorious possession of the whole of said claim on the 9th day of January, 1889, and ever since have been in the uninterrupted, exclusive, open and notorious possession of the whole of said claim. The said defendant in its said answer then sets up its written lease to the defendant M. D. McCumber, dated the 15th day of August, 1908.

Paragraph IV of the Answer of the defendant corporation alleges that the alleged placer mining claim described in Paragraph IV of plaintiff's complaint as Bench No. 1 Moonlight Creek near Moonlight Springs, covers and embraces an overlap of a large portion of the westerly end of the Grant claim above described, and now in possession of said answering defendant as above mentioned, the exact boundaries and limitations claimed by said plaintiff being unknown to said answering defendant; that said plaintiff has no right, title, interest or estate in and to that said part or portion so claimed of the said Grant claim, but wrongfully and unlawfully and without right, asserts

title and ownership thereto; said defendant then again alleges that it is in possession of said overlap.

In its second affirmative defense said defendant sets up ownership in the said Grant claim and alleges that it and its grantors and predecessors in interest, have been in the uninterrupted, notorious and exclusive possession of the whole of said placer claim, under color and claim of said title by reason of said Grant location, ever since the 9th day of January, 1889.

The third affirmative defense of said defendant alleges that said defendant was in the exclusive possession of the said overlap at the time of the commencement of this action by plaintiff.

In the fourth affirmative answer said defendant pleads an estoppel against plaintiff. The said defendant then prays judgment:

1st: That the complaint of plaintiff be dismissed.

2nd: That it be decreed that the defendant, the Pacific Coal and Transportation Company, is the owner in fee of the whole of said Grant claim as above described.

4th: That it be decreed and adjudged that the plaintiff has no claim, estate, interest or demand in or to any part or portion of said Grant claim as above described.

5th: That it be adjudged and decreed that the plaintiff be forever barred and enjoined from asserting any claim, right, title, interest or estate

in or to any part or portion of said Grant claim as above described.

7th: For such other and further relief as may seem meet and proper to the Court (Tr., p. 9).

To the answers of said defendants, plaintiff filed a reply, denying all of the several affirmative answers (Tr., p. 12).

Thereafter and on May 20th, 1911, the defendant corporation presented to the Court a motion to have this cause placed on the jury calendar for trial and after argument of counsel, said motion was submitted to the Court, taken under advisement (Tr., p. 8) and denied (Tr., p. 19).

Thereafter and on February 1st, 1911, the defendant gave notice of a motion to submit certain issues herein to the jury (Tr., p. 19), which motion was thereafter argued by counsel for plaintiff and defendants and by the Court denied (Tr., p. 20).

Thereafter by stipulation of counsel, this cause was set for trial on Tuesday, September 5th, 1911, subject to a motion for continuance (Tr., p. 20).

Thereafter on November 6th, 1911, the defendants separately filed amended answers to the complaint herein (Tr., pp. 25-44, and Tr., pp. 45-76).

The said amended answers being identical except that the defendant McCumber is alleged to be the lessee of the defendant Pacific Coal and Transportation Company. Both answers deny all of the material

allegations of the complaint and especially deny the possession of the plaintiff (Tr., p. 90).

Then follow seven separate and affirmative defenses.

The first affirmative defense alleges, among other things, that the defendant Pacific Coal and Transportation Company is the owner of the Moonlight or Grant claim alleged to have been located on the 9th day of January, 1899, describing it by metes and bounds according to survey; sets up the tenancy of McCumber under a lease dated the 5th day of August, 1908; also alleges that the placer mining claim described in Paragraph IV of plaintiff's complaint as No. 1 Bench Moonlight Creek near Moonlight Springs, covers and embraces an overlap of a large portion of the westerly end of the Grant claim as described by defendants, and alleges that the exact boundaries and limitations claimed by the said plaintiffs are unknown to the said answering defendants and that the said plaintiff has no right, interest or estate in and to said part or portion so claimed by the said defendants under said Grant claim, but wrongfully, unlawfully and without right assert title and ownership thereto; and the said defendants then again allege that they are in possession of said overlap and said Grant claim.

In the second affirmative defense defendants allege ownership of the said Grant claim and that their grantors and predecessors in interest have been in the

uninterrupted, notorious and exclusive possession of the whole of said Grant claim under color and claim of title by reason of said Grant location ever since the 9th day of January, 1899.

The third affirmative defense in substance is that the defendants were in the exclusive possession of the whole of the Grant claim, including the ground in controversy, on the date when plaintiff commenced this cause of action, to wit: the 7th day of November, 1910.

The fourth affirmative defense alleges ownership in the defendants by reason of the Grant location made on the 9th day of January, 1899, describing the premises by metes and bounds, the transfer by mesne conveyances to the defendant, Pacific Coal and Transportation Company; that plaintiff asserts ownership, title and possession to a large portion of the westerly part of the Grant claim as described in paragraph IV of plaintiff's complaint; that plaintiff ought not to be permitted to allege and assert that it is the owner and entitled to the possession of said part of said Grant claim, or any part thereof,

"because that ever since the 9th day of January, 1899, this answering defendant, the Pacific Coal and Transportation Company, its predecessors and grantors, were the owners of the said Grant claim as above described by metes and bounds and in the exclusive possession thereof, and entitled to such exclusive possession, and because that ever since said 9th day of January, 1899, the defendant, the

Pacific Coal and Transportation Company, its grantors and predecessors in interest, were, have been and now are in the uninterrupted, open, adverse and notorious possession of the whole of said Grant claim and the conflict area thereof, and have been engaged for more than seven years last past in operating, mining and developing the said premises and particularly the part in controversy in this action, with full knowledge and notice on the part of said plaintiff, and without any objection, intervention or complaint on its behalf; that the defendant, Pacific Coal and Transportation Company, and its lessees have expended large sums of money in mining, prospecting and developing the said area in conflict of said Grant claim, without objection or complaint from or on behalf of said plaintiff and with its full knowledge, ever since the location thereof on January 9, 1899."

The fifth affirmative defense alleges that at all times mentioned in plaintiff's complaint the defendant, Pacific Coal and Transportation Company, its grantors, and predecessors in interest were in the actual, open, exclusive, notorious and uninterrupted possession of the premises in dispute.

The sixth affirmative defense alleges that plaintiff's cause of action was barred by the provisions of Secs. 3 and 4 of Chapter 2, Part IV of the Civil Code of Alaska, and by virtue of Sec. 361, Chapter 38, Part IV, of the Civil Code of Alaska.

The seventh affirmative defense recites the history of certain litigation conducted in the District Court

for the Division in which this case was tried, between the Moonlight Springs Water Company, plaintiff, vs. George Doverspike, et al., defendants, whereby the Moonlight Springs Water Company sought to enjoin Doverspike et al. from polluting the waters of Moonlight Spring, and alleges that by reason of the matters and things alleged in said affirmative defense the plaintiff is estopped from asserting title to the premises in controversy. The said defendants then pray judgment as follows:

"1. That the said complaint of plaintiffs be dismissed.

"2. That it be adjudged and decreed that the defendant, Pacific Coal and Transportation Company, is the owner in fee of the whole of said Grant claim, as above described.

"3. That it be adjudged and decreed that the title to the ground in controversy be quieted and confirmed in this answering defendant, subject to the leasehold estate of the defendant M. D. McCumber.

"4. That it be decreed and adjudged that the plaintiff has no claim, estate, interest or demand in or to any part or portion of the said 'Grant' claim as above described.

"5. That it be adjudged and decreed that the plaintiff be forever barred and enjoined from asserting any claim, right, title, interest or estate in or to any part or portion of the said 'Grant' claim as above described.

"6. That this answering defendant do have and recover its costs and disbursements in this action.

"7. For such other and further relief as may seem meet and proper to the Court" (Tr., p. 94).

To the amended answers plaintiff filed separate replies (Tr., pp. 77-82; Tr., pp. 83-88), denying all the allegations of the first affirmative defense except that the premises described in its complaint called Bench No. 1 Moonlight Creek covers and embraces a portion of the westerly end of the alleged Grant claim as described in defendants' answers and denies all of the material allegations of the several affirmative defenses except that it admits that the actions therein mentioned were commenced as therein alleged and that the legal proceedings had in said actions were had as therein alleged and that in the year 1906 the Moonlight Water Company was organized.

In reply to said answer and the sixth affirmative defense plaintiff alleged in each of said replies:

"1st. That the defendant, Pacific Coal and Transportation Company, is a foreign corporation organized under the laws of the State of Maine, and has not, since the year 1907, filed any annual statement with the Clerk of the District Court for the District of Alaska, Second Division, and has not prior to February 8th, 1904, filed with said Clerk of said Court, an authenticated or other copy of its charter or articles of incorporation, or any statement, as required by Chapter 23, Part V,

of the Civil Code of the District of Alaska; and had not prior to said last named date, designated an agent within the District of Alaska, or at all, upon whom service of process might be had as required by said chapter of the Code of the District of Alaska.

"2nd. That said defendant, Pacific Coal and Transportation Company, have not, since the year 1909, and for more than one year prior to the commencement of this action, had a designated agent resident within the District of Alaska upon whom service of process might be had, as provided for in Chapter 23, Part V, of the Code of the District of Alaska; and have not, during said last named period, had any agent or officer or representative resident within the District of Alaska, or within the District of Alaska upon whom service of process might be had.

"3rd. That the defendant, Pacific Coal and Transportation Company, claims title to the alleged Grant placer mining claim from the Corwin Trading Company, a foreign corporation organized under the laws of the State of New Hampshire.

"4th. That said Corwin Trading Company has never at any time filed an authenticated copy, or any copy, of its articles of incorporation or charter, or any statement or designation of any resident agent, with the Clerk of the District Court, Second Division, of the District of Alaska, as required by Chapter 23, Part V, of the Code of the District of Alaska, and has never had any officer or agent upon whom service of process is

authorized or might be had, resident within the District of Alaska."

The issues presented by the pleadings are:

- 1st. General issues involving the location of the respective placer mining claims;
- 2nd. The statute of limitations;
- 3rd. Title by prescription in defendant;
- 4th. Equitable estoppel;
- 5th. Laches.

The suit was brought before the Court sitting without a jury and judgment rendered in favor of the plaintiff and against the defendants.

The undisputed facts, as they appear in the evidence, are that the plaintiff's location Bench No. 1 on Moonlight, was located on the 3rd day of January, 1899 (Tr., pp. 211-227), and the defendant's location of the Grant claim was made on the 9th day of January, 1899 (Tr., p. 228), with the assistance of the locator of the said Bench No. 1 claim. For some reason which is not apparent to us, and contrary to the record, appellants state that said Grant claim was located on the 3rd day of January, 1899 (Br., p. 2), and prior to the location of the Bench claim on said last mentioned day (Br., p. 4).

That the boundary marks of the plaintiff's location as established upon the ground by its locator at the time the location thereof was made (Tr., p. 216), were re-placed in their original position in 1902 (Tr., p. 330) and in 1909 or in 1910 (Tr., p. 281), and the boundaries remain the same as in 1899 (Tr., p. 233).

During the trial it was stipulated that the record title to the Bench No. 1 on Moonlight Claim was in the plaintiff (Tr., p. 231), and it was further shown that on September 16th, 1903, the said claim was conveyed to plaintiff (Tr., p. 232).

It further appears in the evidence that the plaintiff in addition to making the requisite annual expenditure had for several years prior to the commencement of this action maintained upon the ground in controversy a large ditch and also a nest of pen-stocks, from which ditch and pen-stocks have been constructed at least six pipe lines varying in size from twelve to thirteen inches, extending over and across the area in conflict, said pipe lines having been used in conveying water to plaintiff's various mining operations in the immediate vicinity, a portion of the water so conveyed being applied on the lower or westerly end of Bench Claim No. 1 during the two or three years immediately preceding the commencement of this action, in conducting extensive mining operations upon Bench Claim No. 1; that during each year since the construction of said pen-stocks and pipe lines plaintiff has expended from Eight hundred dollars to Twelve

hundred dollars in repairs and improvements and cleaning of the pipe lines upon the ground in controversy.

That during the summer of 1910, from about the 12th of May to the 27th of October, the defendants were not in the actual possession or engaged in mining upon the Grant claim, nor the ground in controversy, during which time plaintiff was carrying on extensive mining operations on Bench Claim No. 1 by hydraulic process, and that on the 7th day of November, 1910, the date of commencement of this action, two employees of the plaintiff were engaged in mining upon said Bench Claim No. 1 (Tr., p. 98; Tr., p. 276).

ARGUMENT.

I.

MULTIFARIOUS ASSIGNMENTS OF ERROR ARE NOT VIEWED WITH FAVOR BY THE FEDERAL COURTS.

The defendants announce to this Court that they rely on seventy-nine alleged errors in prosecuting this appeal (Tr., pp. 173-190) (Br., p. 2).

“What the assignment of errors lacks in quality is made up in quantity. They are one hundred and thirty-four in number. As is generally the case, such interminable assignments, instead of impressing the Court with the thought of an imperfect trial, rather cast discredit upon the worth of

any of them. In *Times Publishing Co. vs. Carlisle*, 94 Fed., 762-781, Judge Sanborn quite aptly hit this too common practice:

“‘When counsel of the learning and ability of those who presented this case, gravely announce to an appellate court that they rely upon seventy-four alleged errors for the reversal of the judgment against their clients and some of those specified turn out to be as frivolous as those we have just cited, it is at least difficult to resist a suspicion that they themselves were not certain there was no substantial error in the case.’”

Shepard vs. U. S., 160 Fed., 584-592.

In *Chicago Co. vs. M'Donough*, 161 Fed., 657, Judge Vandevanter, speaking for the Court, said:

“There was nothing unusual about the case as it was presented in the Circuit Court, as respects either the volume of evidence produced or the number of questions of law arising for decision, and yet more than sixty assignments of error are made and seemingly relied upon.

“All of these have been tentatively considered, but we feel constrained to repeat the admonition given in *Mich. Home Colony Co. vs. Tabor*, 141 Fed., 332, that—

“‘The practice of filing such a large number of assignments can not be approved. It thwarts the purpose sought to be subserved by the rule requiring assignments. It points to nothing. It leaves opposing counsel and the Court as much in

the dark concerning what is relied on as if no assignments were filed.' ”

And we also repeat the observation made in *Shepard vs. U. S.*, 160 Fed., 584-592, that generally speaking:

“ ‘Such interminable assignments, instead of impressing the Court with the thought of an imperfect trial, rather cast discredit upon the worth of them.’ ”

II.

OBJECTION TO A COURT OF EQUITY TRYING TITLE TO LAND IS WAIVED BY ANSWER WHICH SEEKS EQUITABLE RELIEF.

The defendants separately answered; thereafter the defendants moved the Court “to have this cause placed on the jury calendar for trial” (Tr., p. 8), which motion was denied (Tr., p. 19).

Thereafter the defendants gave “notice of a motion to submit certain issues herein to the jury” (Tr., p. 19), which motion was denied (Tr., p. 20).

Upon principle and authority, the record in the case at bar presents a plain and clear case of equity jurisdiction, and that it was properly exercised.

We submit that by all the authorities, the Court here was competent to grant the relief sought, it having jurisdiction of the subject-matter. The right to an issue or a trial by jury may be waived, either expressly or by not insisting on it at the proper time.

The only substantial objections ever urged against the power or propriety of a determination of the question of title by a court sitting in equity are that equity has not jurisdiction when there is an adequate remedy at law—that to do so would deprive the party of the right to a trial by jury and the question of legal title must be decided at law but not in equity.

“The rule, that disputed titles must be established at law, is for the reason that equity will not in general try disputed titles of land. But the rule is one of expediency and policy, rather than an essential condition and basis of equitable jurisdiction.”

1 *Pom. Eq. Jur.*, 252.

Thus, as to the right to a jury trial, that does not exist in cases where equity has jurisdiction, and if it did, it can always be waived.

“If a defendant in a suit in equity answers and submits to the jurisdiction of the Court (as in the case at bar), it is too late for him to object that the plaintiff has a plain and adequate remedy at law. I *Daniel Ch. Pr.* (4th Am. Ed.), p. 555; *Reynes vs. Dumont*, 130 U. S., 395; *New Orleans vs. Morris*, 105 U. S., 600. Good faith and an early assertion of rights are as essential on the part of the defendant as of the plaintiff. *Brown vs. Iron Co.*, 134 U. S., 530.”

Levi vs. Evans, 57 Fed., 677.

See also:

Book vs. Justice Co., 58 Fed., 827.

An action at law or a feigned issue is not jurisdictional.

Belknap vs. Trimble, 3 Paige, 601.

The feigned issue is not made for the purpose of defeating the jurisdiction of the Court but to aid the conscience of the Court on a question of fact which is incidental and material to the trial of the issues and merits of the case. By calling for the statement of feigned issue, the jurisdiction is again consented to.

"It is not an objection to the jurisdiction of equity that legal questions are presented for consideration which might also arise in a court of law. If the controversy be one in which a court of equity alone can afford the relief prayed for, its jurisdiction is unaffected by the character of the questions involved."

Holland vs. Challen, 110 U. S., 25;

Gormley vs. Clark, 134 U. S., 349;

Wehrman vs. Conklin, 155 U. S., 322.

"The reasoning in the case of *Holland vs. Challen*, 110 U. S., 23, is very apt when considering cases under our (Alaskan) code. In this case the Court quotes a Kentucky statute which is very similar to ours; also a statute of Nebraska which

is very much broader than ours as it authorizes a suit even to parties out of possession."

Opinion (Tr., p. 15).

In overruling the defendant's motion to have the case at bar tried to a jury, Judge Murane said:

"The Circuit Court of Appeals for the Ninth Circuit in the case of *Madden vs. McKay*, 144 Fed. Rep., 64, seems to very clearly lay down the proper procedure in a case of this character and appears to establish the rule by which this Court should be guided in passing upon the question as to whether or not an action should be tried to a court of equity or should be transferred to the law side of the court and tried to a jury. We quote from the opinion in said case:

" 'Under such a statute (Sec. 475 of the Alaska Code), if the facts pleaded present a case of equitable cognizance the case should be heard on the equity side of the court according to the procedure provided for the disposition of such cases, and if the complaint is sustained the plaintiff will be given equitable relief. If, on the other hand, the facts alleged are such as to bring the case within the cognizance of a court of law, it will be tried as an action at law and the right of the parties to a jury trial will be conserved. If the complaint be framed ostensibly as a bill in equity and yet is in substance a complaint in an action at law, the remedy of the defendant is to move that it be dealt with and heard as an action at law.'

"This, in substance, is what the defendants are

now demanding in this case, but it will be seen from the quotation from the above case that the issue is determined from the allegations of the complaint."

Opinion (Tr., pp. 13-14).

But "even an objection that the action should have been brought at law instead of in equity may be waived by failure to take advantage of it at proper time."

Insley vs. U. S., 515.

See also:

Opinion (Tr., p. 18).

Judge Murane further said:

"The Supreme Court of the State of Oregon in a number of decisions sustained the validity of their Sec. 500, which in substance is the same as our (Alaskan) Sec. 475, and even has gone further in that the Court has held that the plaintiff need not be in possession in order to maintain the action if the defendant is not in possession. *Coolidge & McClaine vs. Forward*, 11 Or., 118; *Thompson vs. Woolf*, 8 Or., 455. . . . The Supreme Court of the United States has sustained the Oregon statute in the well considered case of *Stark vs. Starr*, 73 U. S., 409."

Opinion (Tr., pp. 14-15-18).

The complaint in this case contains every averment essential to the statutory complaint to quiet title.

See

Ely vs. New Mexico, 129 U. S., 291;
Goldsmith vs. Gilliland (Oregon), 22 Fed.,
 867.

In *Ely vs. New Mexico* the allegations of the complaint were:

1. That the plaintiff was the owner in fee of certain land;
2. That the defendant claimed an estate or interest in and to said land adverse to the plaintiff, and that said claim was unfounded.

It was held that the complaint was sufficient to authorize the Court to determine the claim of the defendant, and the title of the plaintiff, and, also, if the facts proved at the hearing justified it, to grant an injunction, or other equitable relief.

Were this not so, the answer supplied any possible deficiency of allegation.

Webb vs. Davis, 32 Ark., 554.

See

Johnson vs. Waters, 111 U. S., 640.

The right of a party in possession to sue in equity to

determine an adverse claim cannot be taken away by a wrongful intrusion upon the smallest fraction of his possession. The court of equity having obtained jurisdiction to quiet the title, will not stop and discriminate between the bulk of the property still in possession of the plaintiff and the portion intruded upon, but in conformity to its well known principles will proceed and decree full and final relief in the premises.

So, in *Book vs. Justice*, 58 Fed., 827, as we understand the opinion, though the complainants were in possession of a portion of the ground claimed by the defendants, and the defendants might have maintained ejectment therefor, a decree was made enjoining the complainants from asserting any claim to or working upon any portion of the ground claimed by defendants. The principles there announced as to the duty of the court having regularly obtained jurisdiction of the case as an equity case under the pleadings, to settle the rights of the parties although an action at law might have been sustained.

In the case at bar the defendant, McCumber, interposed a general demurrer (Tr., p. 5, which was overruled (Tr., p. 7).

No demurrer was interposed by the defendant corporation.

Thereafter and before demanding a trial to a jury both defendants answered separately (Opinion, Tr., pp. 9-11).

The answers of each of said defendants were iden-

tical, except that the defendant McCumber is alleged to be a lessee under a lease from the defendant, the Pacific Coal & Transportation Company. Both answers deny all the material allegations of the complaint and specifically deny the possession of the plaintiff. Then follow four separate affirmative defenses (Tr., pp. 10-11).

It thus appears that the defendants not only answered by denials and by affirmative matter constituting a defense but they answered by a pleading in the nature of a cross-complaint, in which they pleaded title to a portion of the ground described in the complaint, in the defendant corporation subject to a leasehold interest in the defendant, McCumber, and prayed that the defendant corporation be decreed to be the owner of the premises in controversy; thus submitting to the determination of the Court the very issue the plaintiff sought to have submitted.

The defendants by their own volition sought the equitable relief of the court and distinctly invoked its equitable interference.

By thus pleading, the defendants waived any right they may have had to object to the power of the Court to deal with the case as one in equity; the Court having the power to grant the relief sought.

Johnson vs. Waters, 111 U. S., 640;

Cavender vs. Cavender, 114 U. S., 464;

Union Trust Co. vs. Midland Co., 117 U. S.,
434;

Reynes vs. Dumont, 130 U. S., 395;
Kilbourn vs. Sunderland, 130 U. S., 505;
Brown vs. Iron Co., 130 U. S., 530;
Insley vs. U. S., 150 U. S., 512;
Perego vs. Dodge, 163 U. S., 160;
Book vs. Justice Co., 58 Fed., 827;
Richardson vs. Green, 61 Fed., 423;
Williamson vs. Munroe, 101 Fed., 322;
S. P. Co. vs. U. S., 133 Fed., 651;
Forderer vs. Schmidt, 146 Fed., 480;
Cockrell vs. Warner, 14 Ark., 345;
Pindall vs. Trevor, 30 Ark., 250;
Cohen vs. Knox, 90 Cal., 266;
Antonelli vs. Lumber Co., 140 Cal., 309;
Hawthorne vs. Smith, 3 Nev., 182;
O'Hara vs. Parker, 27 Or., 156;
State vs. Blize, 37 Or., 404;
Siedschlad vs. Griffin, 132 Wis., 106.

The objection that the action should be tried to a jury instead of a court of equity, is waived by failure to take advantage of it at the proper time by appropriate plea; the question not being jurisdictional but going only to the particular remedy pursued.

Insley vs. U. S., 150 U. S., 512;
O'Hara vs. Parker, 27 Or., 156;
Bates vs. Drake, 28 Wash., 447;
Weatherwax L. Co. vs. Ray, 38 Wash., 545.

After the denial of defendants' motion to try the case to a jury, the defendants moved the Court to submit certain issues to the jury (Tr., p. 19), which also was denied (Tr., p. 20). Thereafter the defendants filed separate amended answers (Tr., pp. 25-44, Tr., pp. 45-76), and on the issues so joined the case proceeded to trial before the Court.

In *Ely vs. New Mexico*, the Supreme Court, in sustaining the jurisdiction adverted to the distinction between cases arising in state and territorial courts and cases in the Federal Circuit Court. It rests upon the proposition that in the Federal courts, where the separation of law and equity is preserved, the plea must show some reason for resorting to equity. If in *Eli vs. New Mexico*, the plea had averred possession in the plaintiff, the jurisdiction would have been upheld on general principles, even if the case had originated in the Federal courts. Having regularly obtained jurisdiction of the case at bar, under the pleadings as an equity suit, it was the duty of the Court to settle and determine the rights of the parties in accordance with the principles of equity and justice, although the case might have been tried to a jury to settle and adjudicate their rights.

Book vs. Justice Co., 58 Fed., 827, and authorities there cited on pp. 831 and 832.

"Under Sec. 475, Code Alaska, providing that any person in possession of real property, may

maintain an action of an equitable nature against another who claims an estate or interest therein adverse to him for the purpose of determining such claim, and Rev. Stat., Sec. 910, which provides that no possessory action for the recovery of any mining title shall be affected by the fact that the paramount title to the land is in the United States, but each case shall be adjudicated by the law of possession, one in possession of a mining claim in Alaska under a valid location has such title as will support an action to quiet title against an adverse claimant."

Fulkerson vs. Chisna, 122 Fed., 783.

Equity regards not form in these matters. It is enough that the averments and issues joined present a case for the exercise of its powers.

But the appellants urge in their brief that by virtue of the Seventh Amendment to the Constitution of the United States, they had a right to a trial by jury in the case at bar, and cite a number of authorities to sustain that position. In our opinion it is not necessary to review these authorities, for the question of waiver of such right was not presented in or passed upon in any of the cases so cited.

But, assuming for the sake of argument, that the appellants had a right to a trial by jury herein, then we submit that such right was waived by them, by their having previously submitted to the equitable jurisdiction of the Court, and the person who waives a consti-

tutional provision should not be heard afterwards to claim the protection of it.

Lee vs. Tillotson, 24 Wend., 337;

Mayor vs. N. Y. Co., 143 N. Y., 26.

“It is a well settled maxim that a party may waive the benefit of any condition or provision made in his behalf, no matter in what manner it may have been made or secured (*Brooms Legal Maxims*, 547). It extends to all provisions, even constitutional and statutory as well as conventional. . . . This waiver may be established by evidence of an express waiver, or by circumstances from which such waiver may be inferred.”

Knarston vs. Manhattan L. Co., 143 Cal., 63.

See also:

Morton vs. Nebraska, 21 Wall., 660;

Clark vs. Barnard, 108 U. S., 436;

Gunter vs. Atlantic Coast, Etc., Co., 200 U. S.,
273;

in which three last cases there was a waiver on the part of a state of the Fifth Amendment to the Federal Constitution.

See also:

Great Falls Co. vs. Garland, 124 U. S., 581;

Pierce vs. Somerset Ry., 171 U. S., 648;

Skinner vs. Franklin, 179 Fed., 862;

Hurley vs. Allman, 129 N. Y. Sup., 14;
People vs. Police Com., 174 N. Y., 17.

Pleading in bar to an indictment, was held to be a waiver of the right to object to the constitutionality of a law by which the grand jury was made up.

U. S. vs. Gale, 109 U. S., 65.

See:

Hoy vs. Hubbell, 109 N. Y. Sup., 301.

In an equitable action, such as is the case at bar, the submission of an issue of fact to a jury is entirely discretionary.

Garsed vs. Beall, 96 U. S., 695;
Wilson vs. Riddle, 123 U. S., 615.

So the jury's verdict when rendered is merely advisory and not binding upon the Court.

Harding vs. Handy, 11 Wheat., 121;
Pront vs. Roby, 15 Wall., 475;
Little vs. Alexander, 21 Wall., 503;
Watt vs. Starke, 101 U. S., 252;
Quinby vs. Conlan, 104 U. S., 424;
Perego vs. Dodge, 163 U. S., 165.

It may be disregarded entirely, and a decree at vari-

ance therewith may be entered without formally setting it aside.

Idaho Co. vs. Bradbury, 132 U. S., 516;

Kohn vs. McNulta, 147 U. S., 240.

We submit that under the circumstances of this case the trial court did not err in denying appellants' demand for a jury.

III.

THE COURT DID NOT ABUSE ITS DISCRETION IN DENYING DEFENDANT'S MOTION FOR A CONTINUANCE OF THE TRIAL FOR THE PURPOSE OF RE-TAKING THE DEPOSITION OF ANDREW JENSEN.

The motion for a continuance of the trial for the re-taking of the deposition of Andrew Jensen was addressed to the discretion of the Court and being based upon insufficient grounds was properly denied.

The defendants admit that they were disappointed in the testimony given by the witness Andrew Jensen, a resident of North Dakota, in a deposition taken at their instance, and sought to re-examine him for the purpose of laying the foundation for impeachment of his statements contained in said deposition if he continued to deny the statements purporting to have been made by him anterior thereto in alleged letters and telegrams sent by him to his son, a resident of the place in which the trial of this case was had, and of

which the defendants had knowledge prior to the taking of said deposition.

Continuances are not favored in the law and in a country like Alaska where there are so many changes and vicissitudes, it is impossible to attain the attendance of witnesses from term to term as in older communities and unless the courts of that district are prompt in the adjudication of controversies there would be no security for private rights therein.

However pleasing it might have been for the defendants to have been allowed to attempt to morally convict their witness Andrew Jensen of perjury, it being prevented from doing so made no material difference in the outcome of this case. The record shows that Jensen was corroborated in all the essential particulars by all of the plaintiff's witnesses who were interrogated upon matters affecting the location of the plaintiff's claim or its relative position with those in its immediate vicinity. The most cursory examination of the respective notices of location of the several claims of the plaintiff and defendants alone justifies the statement that the plaintiff's location was the first in time and therefore is the first in right and must be held free from the illogical imputation of overlapping the defendant's junior claim, the validity of which latter location is of serious doubt.

There is nothing in defendant's point that the plaintiff did not oppose their motion for said continuance. The inherent weakness of the affidavit filed in support

of that motion presaged its denial; and the record shows they were not subsequently injured thereby. The Court did not abuse its discretion in refusing to continue the trial for the purpose of re-taking said deposition. It is well settled that the granting of a motion for a continuance is a matter resting in the sound judicial discretion of the lower court, whose ruling is not the subject of review unless for an abuse of such discretion.

Drexel vs. True, 74 Fed., 12;

Davis vs. Patrick, 57 Fed., 909;

Copper River Co., vs. McClellan, 138 Fed.,
333;

Woods vs. Young, 4 Cranch., 237.

IV.

THE DEFENDANTS WERE PRACTICALLY IN CONTEMPT OF COURT IN MAKING THE MOTION FOR A CHANGE OF TRIAL JUDGE HEREIN.

Sec. 808 Carter's Alaska Codes declares that:

"A judicial officer is a person authorized to act in a court of justice. Such officer shall not act as such in a court of which he is a member in any of the following cases:

"1st. In an action or proceeding to which he is a party, or in which he is directly interested;

"2nd. When he was not present and sitting as

McCumber's said affidavit merely states the conclusions of the affiant and is absolutely unsupported upon the record by any facts whatsoever.

The trial judge, according to McCumber, is friendly to the plaintiff. *Non constat* that he is just as friendly with the defendants. It can not be possible that elevation to the bench causes its occupant to sever his social relations with all who may become litigants before him. In any event, the bias and prejudice on the part of a judge is not, under the Alaskan Codes, ground for his disqualification within the District of Alaska.

"It appears that upon the hearing in said court, of a motion made by the petitioner Jones for a change of the place of trial of a certain civil action to which said petitioner was a party, the petitioner filed, presented and read a certain affidavit, and that he was adjudged guilty of contempt for and on account of certain language and statements used and made in said affidavit. It is not necessary to set forth the affidavit here, and it is quite clear that it is of such a character that the act of petitioner in presenting it was disorderly, contemptuous and insolent behavior toward the judge of said court while holding the same, and, as such, was a contempt of said court. If the matter of the affidavit had been material and relevant, and pertinent to any issue before the Court, a different question might be presented. If bias, prejudice, or partiality on the part of a judge was a ground for a change of venue, a party seeking such change

upon such ground would have the right to state in an affidavit the facts upon which he based his charge of said bias."

In re David, 103 Cal., 397.

"As to the appeal from the order denying the defendant's motion to change the place of trial, it is to be observed that the only ground of the motion alleged or attempted to be proved was, that the judge of said court is disqualified from acting in said case on account of his bias and prejudice as against the defendant and A. Pettibone, its President and Resident Manager, which is not one of the grounds of disqualification enumerated in Sec. 170 of the Code of Civil Procedure and therefore not a ground of disqualification."

Mining Co. vs. Mining Co., 83 Cal., 617.

The affidavits of McCumber and Bruner were entirely irrelevant, immaterial and contemptuous, and there is no excuse for or justification of their presentation.

V.

A VALID LOCATION CARRIES WITH IT THE RIGHT OF EXCLUSIVE POSSESSION OF THE SURFACE.

The plaintiff's Bench claim No. 1 on Moonlight was made on January 3, 1889 (Tr., p. 224); the defendants' Grant location was made on June 9th, 1899 (Tr., p. 432). The defendants answering separately

asserted title in the corporation defendant of said Grant claim, which they claim, overlaps the northerly portion of the plaintiff's said claim (Tr., p. 29), and denied generally the plaintiff's ownership of the said Bench claim No. 1 on Moonlight.

A valid location of a mining claim, coupled with annual expenditure, give and continue the *exclusive* right of possession and of the location, which may be actual or constructive as its claimant may elect.

Belk vs. Meagher, 104 U. S., 279;
Wolverton vs. Nichols, 119 U. S., 485;
Gwillim vs. Donnellan, 115 U. S., 48;
Manuel vs. Wulff, 152 U. S., 505;
Black vs. Elkhorn Co., 163 U. S., 445;
St. Louis Co. vs. Montana Co., 171 U. S., 650;
Malone vs. Jackson, 137 Fed., 787;
O'Connell vs. Pinnacle Co., 140 Fed., 884;
Rooney vs. Barnette, No. 2005 (decided by this court on October 7, 1912);
McLemore vs. Express Oil Co., 158 Cal., 559;
Street vs. Delta Co., 42 Mont., 371;
Ricketts on Mines, Sec. 71.

The rule is well established that the rights which a valid subsisting location of a mining claim secures to the locator and his grantors and his successors are clearly defined by law and are wholly unaffected by

any subsequent conflicting location, or swinging of the boundary line of a junior location.

Belk vs. Meagher, 104 U. S., 279;
Del Monte Co. vs. Last Chance Co., 171 U. S.,
 55;
Clipper Co. vs. Eli Co., 194 U. S., 220;
Brown vs. Gurney, 201 U. S., 184;
Farrell vs. Lockhart, 210 U. S., 142;
Swanson vs. Sears, 32 S. C. R., 455;
Zerres vs. Vanina, 134 Fed., 615;
Porter vs. Tonopah Co., 137 Fed., 756;
Swanson vs. Kettler, 17 Ida., 321;
Street vs. Delta Co., 42 Mont., 371.

Where a conflicting location is made the burden of proof is upon the junior locator. So it was for the defendants herein to show that the Grant location did not conflict with the *plaintiff's senior location*.

Hammer vs. Garfield Co., 130 U. S., 291;
Book vs. Justice Co., 58 Fed., 106;
Justice Co. vs. Barclay, 82 Fed., 554;
McCulloch vs. Murphy, 125 Fed., 147;
Bevis vs. Markland, 130 Fed., 227;
Zerres vs. Vanina, 134 Fed., 610;
McKay vs. Neussler, 148 Fed., 86;
Wailes vs. Davis, 158 Fed., 667;
Buffalo Co. vs. Crump, 70 Ark., 525;
Providence Co. vs. Burke, 6 Ariz. 333;
Quigley vs. Gillett, 101 Cal., 469;

Harris vs. Kellogg, 117 Cal., 489;
Emerson vs. McWhirter, 133 Cal., 510;
Callahan vs. James, 141 Cal., 291;
Little Dorritt Co. vs. Arapahoe Co., 54 Colo.,
 431;
Powers vs. Sla, 24 Mont., 243;
Rose vs. Richmond Co., 17 Fed., 25;
Axiom Co. vs. White, 10 S. Dak., 198.

This case could be decided on the authority of *Overman Co. vs. American Co.*, 7 Nev., 312, in which the Court said:

“Each of the parties to this suit claims the disputed ground by virtue of locations made by their predecessors. The rights of these parties is limited to such ground as was originally located. . . . You must ascertain and determine from the evidence what claims were originally located and claimed and their rights (the rights of the parties) will be in *accordance*, the acts, declarations and works of the locators of the respective claims and all circumstances tending the locations can be taken into consideration”—continuing the quotation *mutatis mutandis*.

“If you should believe that the No. 1 Bench Moonlight claim was located for the ground in controversy; and, also that of the Grant claim, and the locations conflict upon the ground, the superior and paramount location and possessory right will prevail, to the extent of the prior right in the party as it existed at the time of the commencement of this action. The plain-

tiff and defendant claimed respective portions of the ground, the northern boundary of the plaintiff's claim as the southern boundary of defendant's claim. The dispute is as to the locality of the dividing line. Plaintiff has introduced evidence tending to show, and it is uncontradicted, that prior to the location of the defendant's claim the predecessors of plaintiff located No. 1 Bench Moonlight; that they planted stakes far enough north to include the controversy and recorded notice which also included the disputed ground.

The defendants have sought to show, not so much that No. 1 Bench Moonlight was not so located, but that they have been in continued possession of the whole of the Grant claim since its location on January 9, 1899, and that the rights of the plaintiff have been forfeited, both as to the remedy and as to the title."

VI.

THE PLAINTIFFS' LOCATION WAS VALID AND PRIOR IN TIME TO THAT OF THE DEFENDANTS' LOCATION.

The testimony given before the Court to the question of title of plaintiffs' Bench No. 1 on Moonlight claim is substantially as follows:

(Note: The deposition of Andrew Jensen was taken at the instance of the defendants and introduced in evidence, without objection, by the plaintiff.)

The plaintiffs' witness Andrew Jensen, the loca-

tor of said claim, testified (Tr., p. 213): "I located the claim called Bench No. 1 Moonlight in the vicinity of the Moonlight Creek, in the Cape Nome Mining District, either the 2nd or 3rd of January, 1899; it ran between Lyng's Moonlight claim on the West and Nelson's on the East and runs up toward Anvil Mountain, not very far from the base of the mountain, nearer to Anvil Mountain than Lyng's Moonlight claim. I filed a location certificate of said claim in the Cape Nome Mining and Recording District. I think there is a mistake in Exhibit "B" in saying that it is bounded on the East by Moonlight claim (referring to the copy of the location certificate attached to his deposition). This must have been made in the recorder's office or else we made a mistake when we wrote it out. I was acquainted with Otto Schueler and C. L. Spanggard in January, 1899. They were present and they assisted me in making the location of the Moonlight claim. The Moonlight claim or Bob Lyng's claim to a certain extent lay between Bench Claim No. 6 Below Good Luck and the Bench No. 1 Moonlight staked by me. I performed labor on Bench Claim No. 1 Moonlight either in February or March, 1899. Otto Schueler was there several times while I was working. I think Dr. Kittleson was there sometimes and they would go walking by there occasionally when I was working. I found gold there about the time I staked it out. It was on the upper part of the claim in the willows. There was a place where it wasn't frozen much. In monumenting Bench No. 1 Moonlight

claim I used willow stakes about four or five feet long and two or three inches in circumference,—we hewed off one side with an axe and wrote with a lead pencil ‘Bench No. 1 on Moonlight’ on each corner stake and on one of them I put the location notice by splitting it on top and putting the location notice in the split.”

The plaintiffs’ witness C. J. Jorgenson (Tr., p. 386) testified that:

“I am acquainted with the Jensen claim, the Carlson claim and the DePue claim. The Jensen claim is the same as the No. 1 Bench Moonlight. No. 1 Moonlight was located by Jensen, the Carlson claim by Mrs. Carlson and the DePue claim by DePue. The Carlson claim was located in 1899 in the Spring; I don’t know the exact date; the others, I don’t know when they were located. I suppose the records show that. They were located by corner stakes; one stake at each corner, when I first saw them, but the Carlson claim besides the stakes, had a hole dug down probably a foot deep and two feet across, and a stake alongside of the hole at the Northwest corner, that would be at the Northeast corner of the No. 1 Moonlight. The others, the corners were marked with willow stakes. I have been upon the Carlson claim probably three or four times every year since 1899. Sometimes more.”

On cross-examination this witness testified:

“I was first on the No. 1 Moonlight claim in

the month of July, 1899. I know the Jensen claim on No. 1 Bench on Moonlight. I examined all the corner stakes at that time in July, 1899. The corners as I have already described, each had a willow stake. I was about to buy a quarter interest in the Carlson claim at that time so I had a reason to look up the adjoining claims to see if they lapped over or came in contact with the Carlson claim. My knowledge of the claims in that vicinity was not confined solely to the Carlson claim; I made an examination of the adjoining claims in that vicinity."

The plaintiffs' witness Elizabeth Carlson Jorgensen testified as follows (Tr., p. 389):

"I am now the wife of C. J. Jorgensen; my former name was Elizabeth Carlson. I am acquainted with the Carlson claim, DePue claim and Bench No. 1 Moonlight claim which was the Jensen claim at that time. The Jensen claim was located by Andrew Jensen some time in the early spring of 1899; the Carlson claim was located by John Nelson in December, 1898; the DePue claim was also located in the early spring of 1899 by DePue. The Nelson claim was first staked by myself and a couple of others for John Nelson about the 20th of December, 1898; and as Nelson did not record the claim I re-located it for myself in April, 1899. When the Nelson claim was staked it was marked by willow stakes at the four corners, and afterwards, when I located it, I put new willow stakes and used the old stakes too, and

on the Northwest corner I dug a hole and threw up a little hill of dirt and put a willow stake in there, and I left the old stake standing too. The other claims, the Jensen and DePue, were marked with willow stakes, I dug the hole myself. I have been on the claims every year a couple of times, except the last three years. My knowledge is derived from personal observation on the ground. The Carlson claim was between the Jensen claim, the No. 1 Bench Moonlight claim and the DePue claim, and adjoining them and lying parallel with them lengthwise. The long side is North and South."

The plaintiffs' witness Thomas Lyle testified as follows (Tr., 378):

"I am a miner and have lived in Nome about twelve years. In June, 1899, I became acquainted with the mining claim called No. 2 East Fork of Moonlight. I went there in the early part of June with Jess Rutter and put some new stakes on the claim—I think it was on June 7th. It was before the fleet came in that year, 1899—about fifty or sixty feet from the Southeast corner of Bench Claim No. 1 on Moonlight."

Rutter set the Southwest corner stake of No. 2 East Fork of Moonlight claim (the witness identified the stake found as at point V upon the map, Plaintiffs' Exhibit "A"); it was a stake two and a half to three feet high, blazed on one side with an axe or hatchet and marked with black lead pencil, "S. E. Corner No. 1 Bench Moonlight."

"I have been on that ground several times since that time, the last occasion being about six weeks ago. I was at the Southeast corner of Bench Claim No. 1 on Moonlight and I was also at the Southwest corner of No. 2, East Fork Moonlight. The Southwest corner of No. 1 Bench on Moonlight as I saw it about six weeks ago was in the same position as when I saw it in 1899 on the 7th day of June."

The witness further testified in substance that Mr. Rutter had staked the claim No. 2 on the East Fork of Moonlight prior to June 7th, 1899, with two stakes and that on the last named date he accompanied Rutter to this claim for the purpose of putting in corner stakes. The No. 2 East Fork claim was located with reference to No. 1 Bench on Moonlight—the westerly end line of the Rutter claim or No. 2 East Fork of Moonlight adjoining the easterly side line of No. 1 Bench Moonlight.

The witness was at the Northeast corner of No. 1 Bench Moonlight claim during the month of July, 1899, and there was a willow stake. It was blazed off with an axe, marked with a lead pencil "N. E. Corner Bench No. 1 Moonlight." It had no other marks on it. He was at this corner on the Moonlight Bench No. 1 claim about six weeks ago and that the corner of the claim is marked in the same place as it was marked in July, 1899. That in placing the Northwest corner stake of Bench No. 2 on Moonlight, or the Rutter claim, he was unable to see on account of the high bank the Northeast corner of the Moonlight Bench

Claim No. 1 and inadvertently got it over the line and on to the Moonlight Bench Claim No. 1. That he was acquainted with Andrew Jensen and saw Andrew Jensen working on No. 1 Bench Moonlight in 1899 at a point about one hundred and fifty feet from the Northwest corner stake of Bench No. 2 of the East Fork of Moonlight.

The plaintiffs' witness Jafet Lindeberg testified (Tr., p. 233):

That he has known the Bench No. 1 Moonlight Creek claim since 1899; that he is familiar with the claim as its boundaries are now marked and that to the best of his recollection the boundaries are the same now as they were at the time the plaintiff purchased the claim in 1903; that he knows Andrew Jensen who located the claim in January, 1899; that he saw Jensen working on this claim in 1899 and talked to him; that he saw Jensen working on this claim in the latter part of May, 1899. He was working close to the East line of the claim or about the middle as to the North and South of the claim as now marked. He was sinking a shaft; he had a conversation with him at that time; that he knows where the Northeast corner stake of the No. 2 Bench claim of the left fork of Moonlight is now situated on No. 1 Bench Moonlight. Jensen was sinking a shaft when he saw him in the Spring of 1899, possibly one hundred to one hundred and fifty feet from the line to the West or Northwest rather and Northeast of the Northerly end of Moonlight

claim. The shaft that he saw Jensen sinking was within the boundaries of Bench Claim No. 1 as it is now designated and marked.

The plaintiffs' witness Arthur Gibson testified (Tr., p. 207) :

That he was a civil engineer and made plaintiffs' Exhibit "A" (Tr., p. 208) ; that he made the actual survey of Bench No. 1 on Moonlight on September 9, 1902 (Tr., p. 325) ; that he found willow stakes at the corners but no legible writing upon the stakes, the corners being identified by one C. L. Spanggard, a witness upon the location notice of Mr. Jensen, and also being one of the persons assisting Mr. Jensen in making the location on No. 1 Bench Moonlight.

VII.

THE DEFENDANT'S LOCATION WAS SUBSEQUENT TO THAT OF THE PLAINTIFF'S LOCATION AND NO RIGHTS WERE INITIATED BY ITS PRETENDED AMENDED LOCATION.

The location notice of the plaintiff's Bench No. 1 Moonlight claim is dated January 3, 1899, is witnessed by O. Schueler and C. L. Spanggard, and was recorded at 1:15 p. m. on January 17, 1899 (Tr., p. 227). The location notice of the defendant corporation's Grant claim is dated January 9, 1899, is witnessed by Andrew Jensen, the locator of the plaintiff's said claim and was recorded at 10:10 p. m. on January 17, 1899 (Tr., 228).

The plaintiff's witness Andrew Jensen testified (Tr., p. 215) :

"I was acquainted with W. N. Grant (the locator of defendant corporation's claim). I assisted him in locating the (said defendant's) claim known as the Grant claim near Moonlight. I went over with him and showed him the two claims I had staked. I witnessed the location of his claim he staked at that time. Grant just put in one willow stake up by the side of one of mine on No. 6 Good Luck—on the upper part towards the mountain. As I remember it Grant's claim could not join Lyng's except possibly on one corner.

"Q. According to the location certificate of Bench Claim No. 1 Moonlight (plaintiff's claim) and the Grant claim, the said Grant claim was located six days after the location of Bench No. 1 Moonlight. Please state whether or not said Grant claim as located and marked on the ground at the time of its location, embraced within its exterior boundaries any of the ground as marked by you within the exterior boundaries of the Bench No. 1 Moonlight.

"A. It did not.

"Q. State whether or not the placer claim located by W. N. Grant on the 9th day of January, 1899, in any way or manner whatever, conflicted with the exterior boundaries of the Lyng claim or the Moonlight claim or with Bench No. 1 Moonlight?

"A. I know it could not conflict because Grant stated it with reference to the other claims and we

could see the stakes of the other claims. I recall fairly well the surface marks of the ground in the locality of Moonlight springs and fairly well recollect the surface conditions of that vicinity as it was represented in January, 1899. There was some flat ground between Grant's location stake and the base of Anvil mountain, but not a great deal. Then it ran up the side of Anvil mountain because I remember asking him why he wanted to stake the claim in that way and he said there might be some gold up in the mountain.

"Q. Please state whether or not at all the times you were the owner of said Bench No. 1 Moonlight claim you ever at any time claimed that the exterior boundaries of said Bench No. 1 Moonlight embraced or included any of the ground of the Bob Lyng or Moonlight claim, or the said Grant claim, as shown on Exhibit 'C' to this deposition?

"A. I never did.

"Q. Please carefully examine Exhibit 'C', the plat attached to these interrogatories, and state whether or not placer claims Bench No. 6 Below Good Luck, the Grant claim, the Lyng or Moonlight claim, No. 2 Moonlight or Lindblom claim and Bench No. 1 Moonlight, as shown on said map, approximately represent the relative original positions of said claims as staked and marked on the ground at the time they were located.

"A. They do not; not on that map. So far as I can see they are altogether wrong."

On cross-examination the witness Jensen testified (Tr., p. 218) :

"Q. At about the time that you located the No. 1 Bench Moonlight did any one locate a claim immediately to the East of your said location, and if so, who?

"A. They did not because the Nelson claim was located East of Bench No. 1 on Moonlight when I located that claim. My Bench No. 1 Moonlight joined Nelson's claim on the Western side of the Nelson claim; they did not have any common corners. My upper stakes on Moonlight were higher towards the mountain than any of those. Nelson's claim was East of mine or Easterly. My claim joined his on the Western side. I don't think my Bench No. 1 Moonlight and the Bob Lyng or Moonlight claim had any common corners. My claim ran along the East side of his but further up towards Anvil mountain; extended further up towards Anvil mountain so they did not have any common corners. The Grant claim and my Bench No. 1 did not have any common corners. A part of the Grant claim might lie between the upper end of my Moonlight claim and the Anvil mountain. Grant placed one middle stake at one of my corners towards Anvil mountain on the upper side of No. 6 Goodluck. At the time I located No. 1 Bench Moonlight, I marked the claim on the ground by putting a stake in each corner; there were four stakes, I would say about four or five feet long and two or three inches in circumference. They were willow stakes. They were

marked with a lead pencil. I squared one side of them with an axe and marked them 'Bench No. 1 on Moonlight' and on one of them I put the location notice. I posted a location notice on one of the corner stakes by splitting it in the top and sticking the notice down. It was recorded in the recorder's office at Nome. I did find gold there when I was looking over the ground. I struck a piece of soft ground quite close to some willows and I dug down and took some dirt to the tent and washed it and found some gold. The discovery of gold that I found warranted me in further prospecting and developing said claim as a placer claim.

"Q. Did you subsequent to the location of Bench No. 1 Moonlight re-set the stakes or further mark the claim on the ground?

"A. I did not.

"Q. If you signed the notice of location made by W. N. Grant as a witness to said location notice, when, where and under what circumstances did you sign the same?

"A. Yes, I signed it right on the place where he put down the stakes when the location was made. I asked him why he wanted to stake the claim upon the side of the mountain and he said there might be gold there. Grant was the only one present, I remember, still Otto Schueler might have been there. The conversation was had right on the place where we put down the stake. I don't know where the exterior boundaries of the Grant claim were because he only put down one stake, he said that was enough. I did not at any time

abandon or intend to abandon any part or portion of the No. 1 Moonlight.

"Q. Did you at any time change the boundaries of said claim (Bench No. 1 Moonlight)?

"A. I never did.

"Q. Did the Grant claim at any time to your knowledge, overlap the No. 1 Bench Moonlight, if so, state when you first discovered such overlap, and to what extent it overlapped?

"A. It did not to my knowledge. I never discovered it because I left in the Fall of 1900.

"Q. By whom and how was your attention first called to any conflict between the Grant claim and the No. 1 Bench Moonlight? And what, if anything, did you do about it?

"A. About five years ago a representative of an eastern company came to my place in Buffalo, N. D., with a map something like the one I had before me and wanted me to give him the location of the Grant claim as near as I remembered it, and I told him all about it as near as I remembered it. I don't know who the man was. The first I ever heard of it was in a letter from my son Tom. The upper end stakes of my Bench No. 1 Moonlight were a little nearer to Anvil mountain than the upper end stakes of the Nelson or Carlson claim, they were up on the bench above the willows. The upper end stakes of my Bench No. 1 Moonlight were nearer to Anvil mountain than the stakes of the Moonlight or Lyng's claim. There were six inches to a foot and a half of snow in places when we staked Bench No. 1 Moonlight and also when the Grant claim was staked. The several claims

were staked in the daytime and I would say between ten and four o'clock. When the Grant claim was staked all the stakes of No. 6 Below Good Luck and also the upper stakes of Robert Lyng's on Moonlight and the two upper stakes of Bench No. 1 on Moonlight owned by me, were visible. At the time I staked Bench No. 1 Moonlight, as far as I remember, there was six stakes marking the Moonlight or Bob Lyng's claim. Only one stake marked the Grant claim at the time of its location. I don't know anything about the East Fork of Moonlight. My Bench No. 1 on Moonlight took in all the willows. There was not any willows between my stakes and the base of Anvil mountain; there were no willows on the Grant claim that I remember. There might have been a few, possible. There was some willows around the Moonlight springs and also a little above the springs, that is in a northwesterly direction toward the mountain. The willows were visible at the time of the location of these claims."

On re-direct this witness testified (Tr., p. 225):

"The first map I saw was from an eastern representative of an eastern firm who showed me a map and talked to me about the location of the Grant claim. The next was last August when Mr. Holt from Fargo, N. D., came to my place and showed me a map and wanted me to look it over and see if I thought it was nearly correct, and asked me to mark it on the map where those claims were originally located. I pointed out on the map

where I thought the claims were originally located, just about as I have marked it in my testimony. I told Mr. Holt the Grant claim looked to me to be too far East. It should have laid more to the West of its location as shown on the map Exhibit 'E' from Mr. Holt."

Said Exhibit "E" was marked Plaintiff's Exhibit "J" for identification and is similar to plaintiff's Exhibit "H" for illustration.

"Q. When was the last time that you were on any of the claims in the vicinity of Moonlight Springs, and what examination, if any, did you make of any of the placer claims in that vicinity?

"A. In September, 1900. I did not make any examination except I saw the stakes there."

The defendant's witness A. G. Kingsbury testified (Tr., p. 428), that in 1901 he made an amended location of the Grant claim, stating therein, among other things, that the same was made for the purpose of taking in overlapping ground in that locality and at that time he rebuilt the monuments of the claim, some *five* in number.

Witness being asked on cross-examination what his object was in filing the amended location answered:

"I do not know. It runs in my blood to do that.

"Q. On the theory that the more times you stake the less others will jump?

"A. Well, perhaps that is what prompted—

"Q. You followed that custom?

"A. I have done it a great many times.

"Q. In your amended location you state the purpose of it was to take in new ground in that locality?

"A. I suppose I was following some form that I thought an amended notice required" (Tr., p. 480).

This witness on his direct examination (Tr., p. 465), was asked the following question and made the following reply:

"Q. How did you know they were the Grant stakes?

"A. Because he (Grant) said they were and said he placed them there. I am familiar with the slopes of Anvil mountain and with what is known as the westerly face of the mountain, also the contour in that vicinity. With the terraces, it is a general incline from the northeastern end or corner of the Grant claim to the southeasterly end, sloping southwesterly to the southwesterly corner. Before the ground was disturbed in any way by mining, the Moonlight Springs was considered the base of Anvil mountain and from there easterly out toward Little Creek in a general way it was fairly level toward Little Creek roadhouse. There was not very much slope from there. There was some terraces or benches between the springs and the roadhouse. The only level ground on the Grant claim were the terraces or benches. The southwest end of the claim was covered with willows in 1899. On the southerly side of the claim the willows ex-

tended, I should say, three or four hundred feet and came down across to the center stake.

"Q. State whether or not any portion of the Grant claim took in any part of what is called the vale or valley, and if so what part of the claim?

"A. Well, it was kind of a low flat place where the Southwest corner was located. It extended off into the willows, I do not know how far but there was probably fifty feet or more of flat ground."

Undoubtedly the incentive for this pretended amended location was that in 1899 the witness Kingsbury and Grant "found some good colors of gold" half way between the present location of the railroad and the southeast corner "within the boundaries of the Grant claim as it is *now marked upon the ground*" (Tr., p. 431), and in 1900 "there was quite a little prospecting done, and work on the *southern end*" (Tr., p. 434), the part in controversy (Tr., p. 435); that the shaft sunk by Kingsbury in 1901 was within the ground in controversy (Tr., p. 437).

Under the guise of an "amended location" the witness Kingsbury, who was one of the organizers of the corporation defendant, financially interested therein, as well as being the agent thereof (Tr., p. 431), sought to make the mineral within the boundaries of the plaintiff's claim, the "discovery" within the defendant's Grant claim, the existence of which at the time of its location (Tr., p. 220) was conjectural as to the presence of mineral therein.

No adverse claim can be founded upon a discovery within a valid and subsisting location.

Swanson vs. Sears, 32 S. C. R., 455.

In the absence of actual discovery within its limits, the location of the Grant claim was void.

Erhardt vs. Boaro, 113 U. S., 527;

Larkin vs. Upton, 144 U. S., 19;

Kingsbury vs. Amy Co., 152 U. S., 222;

Creede Co. vs. Uinta Co., 196 U. S., 337;

Waterloo Co. vs. Doe, 56 Fed., 685;

Smith vs. Newell, 82 Fed., 56;

Walton vs. Wild Goose Co., 123 Fed., 209;

Tuolumne Co. vs. Maier, 134 Cal., 558;

Chrisman vs. Miller, 140 Cal., 440;

McLemore vs. Express Oil Co., 158 Cal., 558;

Ambergris Co. vs. Day, 12 Ida., 108;

Copper Globe Co., vs. Allman, 23 Utah, 410.

Jensen, the locator of the plaintiff's claim, states that his "discovery" was made in the willows on the upper part of the claim (Tr., pp. 215-220); that his claim took in all the willows (Tr., p. 224). There were no willows on the Grant claim that he remembers (Tr., p. 225).

The fact of the "discovery" as well as the physical character of the place at which the "discovery" was made, would naturally impress this upon the memory of the witness,

Waterloo Co., vs. Doe, 56 Fed., 688,

and flatly contradicts the statements of the witness Kingsbury as to the existence of willows upon the Grant claim (Tr., p. 466).

This line of willows is shown by the plaintiff's Exhibit "A" (Tr., p. 209) to be within the plaintiff's Bench Location before they were transplanted upon the Grant claim at the time of the said amended location. (See Tr., p. 465.)

This plat (Exhibit "A") was made from an actual survey made by Arthur Gibson, a civil engineer (Tr., p. 207), on September 9, 1902, from the monuments on the ground and their identification by Mr. Spangard, one of the witnesses to the Bench No. 1 on Moonlight location (Tr., p. 325).

It is patent that the defendant corporation's Grant location and its boundary marks were simultaneously enlarged at the time of said pretended amended location.

VIII.

THE MEANING OF AN ADOPTED STATUTE IS SETTLED BY THE CONSTRUCTION PLACED UPON IT BY THE HIGHEST COURT OF THE ORIGINAL STATE PRIOR TO ITS ADOPTION AND IS NOT AFFECTED BY SUBSEQUENT DECISIONS OF THAT COURT.

When Congress adopts and puts in force in a territory the law of one of the states,—

James vs. Appel, 192 U. S., 129;

Sanger vs. Flow, 48 Fed., 152;

or where a state adopts a statute of another state, it also adopts the construction placed thereon by the courts of the latter state in decisions rendered before the adoption of the statute.

Cathcart vs. Robinson, 5 Peters, 280;

McDonald vs. Hovey, 110 U. S., 619;

Henrietta Co. vs. Gardner, 137 U. S., 123;

Stutsman vs. Wallace, 142 U. S., 293;

Robinson vs. Belt, 187 U. S., 41;

James vs. Appel, 192 U. S., 129;

Welch vs. Barber Co., 167 Fed., 465;

Harrill vs. Davis, 168 Fed., 129;

Jennings vs. Alaska Treadwell Co., 170 Fed.,
146;

Tyler vs. Tyler, 19 Ill., 151;

Commonwealth vs. Hartnell, 69 Mass., 450;

Marqueze vs. Caldwell, 48 Miss., 23;

Lindley vs. Davis, 6 Mont., 433;

State vs. Robey, 8 Nev., 312;

Everding vs. McGinn, 23 Or., 53.

Subsequent decisions of the original state have no more weight in the adopting state than that to which they are entitled by reason of their intrinsic merit.

Cathcart vs. Robinson, 5 Peters, 280;

Hardenberg vs. Ray, 151 U. S., 112.

Hence, the rule that the legislature by adopting the statute of another state, thereby adopts the construction placed on said statute by the courts of that state, does not apply when such construction was *after* the adoption.

In re Heath, 144 U. S., 92;

Myers vs. McGavock, 39 Neb., 843;

Elias vs. Territory, 9 Ariz., 1;

Germania Co. vs. Ross Lewin, 24 Colo., 843;

Barnes vs. Lynch, 9 Okla., 11;

Wyoming Co. vs. State, 15 Wyo., 97.

By the Act of Congress of May 17, 1884, the Code of Civil Procedure of the State of Oregon was declared to be the law of Alaska so far as the same was applicable; and thereafter, when the Code of Civil Procedure of Alaska was adopted by the Act of June 6, 1900, it was taken from the laws of Oregon, both as to the provisions regulating the action of ejectment and prescribing the interest in real estate upon which the action may be brought, and the statute of limitations applicable to such actions.

Tyee Con. Mg. Co. vs. Langstedt, 136 Fed.,
124.

The Act of Congress of June 6th, 1900, making further provision for a civil government for Alaska which provided that no action shall be maintained for the recovery of real property or for the recovery of the

possession thereof, unless it shall appear that the plaintiff, his ancestor, predecessor or grantor was seized or possessed of the premises in question within ten years before the commencement of the action did nothing more than re-enact and print in the statutes of the United States the Code of Civil Procedure of Alaska which had been in force in that territory since May 17, 1884, and was plainly intended to add nothing to what had previously existed under that statute.

Tyee Con. Mg. Co. vs. Langstedt, 137 Fed.,
865,

except the meaning given by the Supreme Court of Oregon to Sec. 500 of the Oregon Code (which in substance is the same as Sec. 475 of the Alaska Code), in the cases of *Beale vs. Hite* and *Altschul vs. O'Neal*, decided by that Court during the year 1899 and reported in Vol. 35 of the Oregon reports.

It must be presumed that when Congress adopted the words of Sec. 500 of the Oregon Code as Sec. 475 of the Alaska Code, that it was familiar with the construction put upon that section by the highest court of that state and that it enacted in the statute of 1900 those words with the meaning which had been settled by the highest court of the State of Oregon.

McDonald vs. Hovey, 110 U. S., 619;
Allen vs. Burke, 120 U. S., 619;
Brown vs. Walker, 161 U. S., 591;

Warner vs. Texas, 164 U. S., 418;
Robinson vs. Belt, 187 U. S., 41;
The Devonshire, 13 Fed., 39;
Kohn vs. McKinnon, 90 Fed., 624;
Peterman vs. N. P. R. Co., 135 Fed., 335;
Commonwealth vs. Hartnell, 3 Gray, 430;
Scruggs vs. Blair, 44 Miss., 406;
Gould vs. Wise, 18 Nev., 253;
Weisner vs. Zann, 39 Wis., 188.

See also:

U. S. vs. Falk, 204 U. S., 143;
 36 Cyc., p. 1153, note 73.

The case of *Beale vs. Hite*, 35 Or., 126 (decided on May 29th, 1899), involved the question of adverse possession of unpatented non-mineral land. The Court held that such land could not be held adversely while the occupant admits the title thereto to be in the United States.

The still later case of *Altschul vs. O'Neil*, 35 Or., 202 (decided on August 7, 1899), is to the same effect.

This construction of the Oregon statute being prior in time to the re-enactment of 1900, must, under the authorities cited, be presumed to have been adopted by Congress as a part of said Act.

It also formed the basis of the decisions in the cases of—

Tyee Mining Co. vs. Langstedt, 136 Fed., 124;
Tyee Mining Co. vs. Jennings, 137 Fed., 864.

Both of these cases involved the question of adverse possession of unpatented mineral land within the district of Alaska and in each case the Court referred to and approved the meaning of Sec. 500 of the Oregon Statute as enunciated by the Supreme Court of that State.

In the case of

Tyee Mining Co. vs. Langstedt,

the Court, referring to the case of *Beale vs. Hite*, said:

“It was (therein) held that to constitute adverse possession there must be, among other requisites, an entry under claim of title hostile to the true owner and to the world, and that an occupant of land can not hold adversely while he admits the title to be in the United States, thus adopting the doctrine of *Ward vs. Cochran*, 150 U. S., 597; *Henschall vs. Bissill*, 18 Wall., 255; *Bracken vs. U. P. R. Co.*, 75 Fed., 347, and *Pillow vs. Roberts*, 13 How., 472; in which it was said that possession to be adverse, must be adverse to all the world.”

In the course of the opinion in the *Tyee-Langstedt* case, the Court said that there was much conflict of authority as to when the statute of limitations begins to run against the entryman of public lands, but

“In cases where the question has been presented

for adjudication, the courts have uniformly held that *the statute of limitations does not begin to run against the claimant of a mining claim before his patent issues.*"

This was based upon the principles that while the title to the ground remained in the United States, no state statute of limitations could confer a right which would interfere with the primary disposal of the soil;

See—

Redfield vs. Parks, 132 U. S., 244;

Gibson vs. Choteau, 13 Wall., 92,

and that the statute of limitations of actions, as enacted by the legislatures of the different states are steadfastly followed by the courts of the United States as rules of decision in cases where they apply.

Hanchett vs. Blair, 100 Fed., 826.

Some nine years after the decision of *Beale vs. Hite* and *Altschul vs. O'Neil* (which were decided in 1899), the Supreme Court of Oregon in *Boe vs. Arnold*, 58 Or., 52, overruled and receded from the doctrine enunciated in *Beale vs. Hite*, *Altschul vs. O'Neil* and *Altschul vs. Clark*. This latter ruling was followed by this Court in the case of *Eastern Land Co. vs. Brosnan*, 173 Fed., 67, under the familiar rule that in construing state statutes the Federal courts follow the construction adopted by the state courts.

Bacher vs. Cheshire, 125 U. S., 555;

Dixon Co. vs. Paul, 167 Fed., 784.

"A careful consideration of *Boe vs. Arnold*, will show that the Court decided the case first on the question of estoppel and simply receded from the erroneous position taken by that Court in prior decisions where it held that until patent had issued there could be no adverse possession, even under a grant in *praesenti*, so long as the party in possession recognizes the title of the United States. The United States cases cited and relied upon in this decision very clearly show that the case of *Boe vs. Arnold* does not conflict in any way with the Tyee case."

Opinion (Tr., p. 105).

which points the distinction between the rights flowing to an entryman under the general land laws and those to a claimant under the mining law. *Boe vs. Arnold* follows the rule laid down by the Supreme Court of the United States that when, in case of a grant in *praesenti*, the grant has been complied with and fully earned the title has attached. That adverse possession continued for the statutory period will bar the right of the grantor to the property so held. This, notwithstanding want of final certificate and the issuance of patent. This does not militate against the doctrine of the Tyee cases and the unbroken line of authorities in harmony therewith, that, until the Gov-

ernment is divested of its title, there can be no running of the statute of limitations.

Boe vs. Arnold is not in point because of the dissimilarity of its facts with those of the case at bar, and it was decided many years after the re-enactment of the Alaskan Codes. Furthermore, the case at bar comes up from Alaska and not from Oregon, as did the Eastern Land-Brosnan case, and, for the foregoing reasons, is not binding upon this Court in this case.

IX.

ADVERSE POSSESSION IS NOT SHOWN IN DEFENDANT CORPORATION.

Sec. 1042 of Carter's Alaska Codes (Approved June 6, 1900), provides that an uninterrupted, adverse, notorious possession of real property, under color and claim of title for seven years or more shall conclusively be presumed to give title, except as against the United States.

See

Tyee Con. Co. vs. Langstedt, 136 Fed., 709;
Altschul vs. O'Neil, 35 Or., 221.

Sec. 4 of Carter's Alaska Codes limits actions to recover real property to a period of ten years before commencement of the action.

In *Altschul vs. O'Neil*, the Court said:

"This Court has established the rule that the holding must be exclusive, for in *Joy vs. Stump* (14 Or., 361), it is said that 'When a person relies upon naked possession as the foundation for an adverse claim, . . . such possession must not only be actual, but also visible, continuous, notorious, distinct and hostile, and of such a character as to indicate exclusive ownership in the occupant. See also, *Hicklin vs. McClear*, 18 Or., 126.

"The proposition is broadly stated in 1 *Am. & Eng. Ency. Law* (2d Ed.), 834, that the possession to be effectual, must be exclusive, not only of the owner, but of all other persons. And in a comparatively recent case in the United States Supreme Court it was held, after a special reference to many authorities, that a possession in participation with the owner or others could not be exclusive. *Ward vs. Cochran*, 150 U. S., 597. See also, *Bracken vs. U. P. R. Co.*, 73 Fed., 347."

See also

Sharon vs. Tucker, 144 U. S., 533;

Lowndes vs. Huntington, 153 U. S., 31;

Tyee Con. Co. vs. Langstedt, 121 Fed., 709.

If evidence as to one or more elements that go to make up a title by adverse possession is wanting, the party claiming by virtue of the statute has no title thereto.

Herbert vs. Hanrick, 16 Ala., 120;

Unger vs. Mooney, 63 Cal., 586;

DeHaven vs. Landell, 31 Pa. St., 120.

"The possession of the defendant in error was not adverse, and did not amount to *disseisen* of the plaintiff in error or its grantors. It was actual, open, notorious and continuous, with a claim of ownership but it lacked two essential requisites. It was not shown to be either exclusive or hostile. The possession not being adverse the statute of limitations never began to run."

Tyee Con. Co. vs. Langstedt, 121 Fed., 709.

Possession and working of a portion of all under claim of ownership of all, is a constructive possession of all, if the remainder is not in adverse possession of another.

Smith vs. Gale, 144 U. S., 509.

Possession not actual but constructive, not exclusive but in participation with the owner or others, falls short of that kind of adverse possession which deprives the true owner of his title.

Ward vs. Cochran, 150 U. S., 597;

Altschul vs. O'Neil, 35 Or., 221;

Tyee Con. Co. vs. Langstedt, 136 Fed., 124.

The law presumes that when title is shown the true owner is in possession until adverse possession is proved to begin.

Lamb vs. Burbank, 14 Fed. Cas., 8012;

Altschul vs. O'Neil, 35 Or., 202.

And where two persons are in mixed possession of the same land, one by title and the other by wrong, the law considers the one who has the title as in possession to the extent of his right as to preclude the other from taking advantage of the statute of limitations.

Cheney vs. Ringold, 2 Harr. & J. (Md.), 75.

It is shown by the testimony of the defendant that the plaintiff "went on the claim in the absence of myself" (W. H. Bard, the attorney for the defendant corporation, from June, 1903, to June, 1906, Tr., p. 578), "and did some assessment work" (Tr., p. 580).

It is shown by the plaintiff's testimony that the plaintiff was in the possession and engaged in mining work upon said claim in the year 1902 (Tr., p. 278) and 1903 (Tr., p. 300), 1904 (Tr., pp. 282, 284, 285), 1905, 1906, 1907 (Tr., pp. 286, 287, 289), 1908 (Tr., p. 291), 1909 (Tr., pp. 270, 292), and 1910 (Tr., pp. 274, 293).

The defendants introduced in evidence affidavits of labor upon the Grant claim for the years 1900-1903, 1906 to 1910 (Tr., pp. 619-635). And it further appears that in the winter of 1903 and 1904 there were some men working upon the ground in dispute for the defendants and that they were told by an officer

of the plaintiff to "vacate, that we owned the premises. They said they were not doing much, they were just prospecting" (Tr., p. 581).

In 1905, Bard, the agent of the defendant corporation, being found on the ground engaged in prospecting, was ordered off the premises (Tr., p. 288).

In the latter part of October, 1910, the lessee of the corporation defendant, was told by a representative of the plaintiff that "we had the older title, and "I would try to stop him if he went to work (upon "the disputed ground), as we had the older title" (Tr., p. 770).

It is clear that the defendants' possession was neither exclusive nor uninterrupted for the period required by the statute to vest title in the corporation defendant.

It is immaterial whether or not this work was done within the disputed territory as entry by the true owner on part is constructive possession of the whole.

Barr vs. Gratz, 4 Wheat., 213.

See

Empire State Co. vs. Bunker Hill Co., 121
Fed., 977;

Hess vs. Winder, 30 Cal., 349;

Stone vs. Perkins, 217 Mo., 586.

The defendants' affidavits of labor have no tendency to prove any adverse possession in defendant corporation. They do not show upon their face that

such work was done upon the disputed premises and if they, or oral testimony in their aid, did so show, such assessment work would, under the facts of this case, be merely evidence of acts of trespass upon defendants' part and in no way affect the title of the plaintiff to the ground in dispute.

Defendants are trespassers—mere intruders upon plaintiffs' lawful possession. Having no right to enter upon that possession they could initiate no right in themselves by overlapping the plaintiffs' location and making annual or other expenditure thereon. Having no right of entry their re-location or overlapping of plaintiffs' claim was void *ab initio*.

Belk vs. Meagher, 104 U. S., 279;

McKinley Creek Co. vs. Alaska United Co.,
183 U. S., 572;

Aurora Hill Co. vs. 85 Mg. Co., 34 Fed., 515;

Book vs. Justice Co., 58 Fed., 106;

Fee vs. Durham, 121 Fed., 469;

Zerris vs. Vanina, 134 Fed., 615;

Horsewell vs. Ruiz, 67 Cal., 112;

Souter vs. McGuire, 98 Cal., 545;

Sullivan vs. Sharp, 33 Colo., 348;

Peoria Co. vs. Turner, 20 Colo., A. 479;

Street vs. Delta Co., 42 Mont., 371;

Overman Co. vs. American Co., 7 Nev., 312.

Two persons can not at the same time hold possession of the same piece of property and it is settled law

that an entry on land by one having the right has the same effect in arresting progress of the statute of limitations (or the statute relating to prescription) as a suit.

Henderson vs. Griffin, 5 Peters, 151.

Where there is a breach in the continuity of the possession, the possession before and after the breach can not be connected.

Brown vs. Hanquer, 48 Ark., 277.

In general when there is no adverse possession there is no *disseisin*, and until *disseisin* the statute of limitations of Alaska could not run against non-mineral land.

U. S. vs. Arredondo, 6 Peters, 689.

And evidence of possession by the plaintiff for seven years is immaterial where the plaintiff, as in the case at bar, claimed under a valid location, which is not seriously disputed by the defendants.

Upton vs. Santa Rita Co., 14 New Mex., 96.

There is some evidence to the effect that a cabin was maintained upon the disputed premises by the defendants herein, but not of its continuous occupancy.

"If one who claims title under a deed to a large tract of land, enters upon it and erects a house

and acquires actual possession of a small part around his house and constructive possession of the whole and the owner of the true title afterwards enters on the same tract in another place, claiming the whole, the constructive possession thus acquired by the owner who first entered is overcome by the constructive possession of the true owner so that the statute of limitations does not run in favor of the one who has not the true title."

Semple vs. Cook, 50 Cal., 26.

X.

THE DEFENDANTS' ALLEGED TITLE BY PRESCRIPTION IS
WITHOUT GROUND TO SUPPORT IT.

The location claimed by the defendant corporation was made with the assistance of the plaintiff's locator (Tr., p. 220), some six days after the location of the plaintiff's claim (Tr., pp. 227, 228) without any intention upon his part to abandon any portion of the latter claim (Tr., p. 221).

It is inherently impossible that the plaintiff's senior location could "overlap" the corporation defendant's junior location as claimed by it in its Amended Answer (Tr., p. 25, par. 2).

The testimony shows that the locator of the plaintiff's claim who assisted in making the defendant's junior location did not know of any overlap at the time of making the plaintiff's senior location (Tr., p. 221).

It appears that at the time the junior location was laid on the ground only one stake marked its boundaries (Tr., p. 221), but that in 1901 an amended location of said junior location was made (Tr., p. 437), and the corner monuments enlarged (Tr., p. 436), possibly swung on to the plaintiff's location, thus creating the overlap.

"The right of location upon the mineral lands of the United States is a privilege granted by Congress but it can only be exercised within the limits prescribed by the grant. A location can only be made when the law allows it to be done."

Belk vs. Meagher, 104 U. S., 279.

Prescription rests upon presumption of a grant, and no prescription can have a legal origin where no grant could be made to support it.

Belk vs. Meagher, 104 U. S., 279;

Home vs. Rogue River Co., 51 Or., 233.

To acquire title by prescription the possession of the property must not only be hostile to plaintiff's title but must be exclusive, continuous and uninterrupted for the statutory period. Any interruption of the adverse possession within that time prevents the acquisition of title by prescription.

Carter's Alaska Code, Sec. 1042;

Big Three Mg. Co. vs. Hamilton, 147 Cal.,
130.

That the defendant corporation did not have the statutory possession is demonstrated in another part of this brief. And even if it did, as the defendant corporation had not placed itself in a position to avail itself of the benefits of the statute of limitations and was evidently not acting in good faith, its possession would not ripen into full title against the plaintiff.

Iowa Land Co. vs. Blumer, 206 U. S., 482.

As between a prior and subsequent locator of the same ground the courts will view the evidence tending to establish the senior locator's rights in the most favorable light. Such evidence will reasonably justify.

Ambergris Co. vs. Day, 12 Ida., 108.

The location of the defendant's claim was void *ab initio*: 1. Because the ground within the overlap was not open to location. 2. Because only one stake was used to mark the claim and no discovery was made at the time of location.

An amended location can not interfere with the rights of others acquired before the time of making the original location and the amendment.

Street vs. Delta Co., 42 Mont., 371.

At the time of the location of the plaintiff's claim there was no conflict with the defendant's claim (Tr., pp. 212, 214, 215, 217, 218, 221), and the rights of the

parties are limited to such ground as was originally located by each.

Overman vs. American Co., 7 Nev., 213.

A scrambling possession is not sufficient to raise the bar of the statute of limitations. It must have extended over the disputed part for the full period.

White vs. Bunty, 24 How., 235;

Brownville vs. Carogos, 100 U. S., 138;

Hamilton vs. Sou. Nev. Co., 33 Fed., 562.

XI.

THE STATUTE OF LIMITATIONS DOES NOT RUN IN FAVOR OF A FOREIGN CORPORATION WHICH DOES NOT DESIGNATE AN AGENT UPON WHOM PROCESS MIGHT BE HAD IN ITS BEHALF AS REQUIRED BY THE LAWS OF THE STATE OF ITS ADOPTION.

Sec. 225 of Carter's Alaska Codes provides that—

“All corporations or joint stock companies under the laws of the United States, or the laws of any State or Territory of the United States, shall, before doing business within the district, file in the office of the Clerk of the District Court for the Division wherein they intend to carry on business, a duly authenticated copy of their charter or articles of incorporation, and also a statement, verified by the oath of the President and Secretary of such corporation, and attested to by a majority of its

board of directors, showing the name of such corporation and the location of its principal office or place of business within the district, and if it is to have any place of business or principal office within the district, the location thereof, together with a statement of its financial condition.

“Such corporation or joint stock company shall also file at the same time and in the same offices, a certificate, under the seal of the corporation and the signature of its President, Vice-President, or other acting head, and its Secretary, if there be one, certifying that the corporation has consented to be sued in the Courts of the District upon all causes of action arising against it in the district, and that service of process may be made upon some person, a resident of the district, whose name and place of residence shall be designated in such certificate, and such service, when so made upon such agent, shall be valid service on the corporation or company, and such agent so residing at the principal place of business of such corporation or company in the district.”

Sec. 226 provides for the filing of the written consent of the person so designated.

Sec. 231 provides that—

“If any such corporation or company shall fail to comply with any of the provisions of this chapter all its contracts with citizens of the district shall be void as to the corporation or company and no court of the district or of the United States

shall enforce the same in favor of the corporation or company so failing."

This action was commenced on November 7, 1910 (Tr., p. 5). It is alleged in the complaint (Tr., 2) and admitted in the separate Amended Answers of the defendants (Tr., p. 25, Tr., p. 45), that the defendant, the Pacific Coal & Transportation Company, "is now and during all the times hereinafter mentioned, it was a corporation duly organized, created and existing under the laws of the State of Maine, doing business in the District of Alaska" (Tr., p. 2).

The defendants pleaded the statute of limitations (Tr., p. 36, par. 2; Tr., p. 57, par. 2). This plea was controverted by the plaintiffs' Reply (Tr., p. 79, par. 5; Tr., p. 85, par. 5), which further alleged "that the defendant corporation had not prior to February 8th, 1904, filed its articles of incorporation or designated an agent within the District of Alaska, or at all, upon whom service of process might be had, nor since the year 1907 had it filed any annual statement as required by the laws of the District of Alaska. That for more than one year preceding the commencement of this suit said corporation defendant had no agent or officer or representative resident or within the district of Alaska, upon whom process might be had."

That the defendant corporation claims title to the alleged Grant claim from the Corwin Trading Com-

“pany, a foreign corporation organized under the laws of the State of New Hampshire” (Tr., p. 79; Tr., pp. 85-86).

These allegations in the reply are fully sustained in the evidence (Tr., pp. 750-752).

The burden of proof was upon the defendant corporation in order to avail itself of the statute of limitations to show by pleading and proof that it and its said grantor had severally complied with the laws of the District of Alaska relating to the designation, by a foreign corporation of an agent residing therein upon whom service of process might be had.

Taylor vs. U. P. R. Co., 123 Fed., 155;

Black vs. Vermont Marble Co., 1 Cal. A., 718.

“To entitle a corporation to the benefit of the statute of limitations of a state other than its creation it must affirmatively appear that it maintained an agent upon whom service of process could be made within the State whose statute of limitations ran and barred the cause of action. No such allegation appears in the answer in this case, nor does it appear from the plaintiffs’ petition. . . . The mere fact that it operated its line of railroad (continuously during said period) will not warrant the Court in inferring that it maintained in the State of Iowa during all of said period an agent upon whom process could be made. That is a question of fact to be submitted to the jury (*Express Co. vs. Ware*, 20 Wall., 543), and should be pleaded to give the party the benefit of the statute. While

the presumption may exist that the corporation organized under the laws of a given State has a legal habitation there, and that service of process could be made within that State, no such presumption arises as to foreign corporations."

Taylor vs. U. P. R. Co., 123 Fed., 155.

"A statute of limitations as against a foreign corporation begins to run from the time such corporation has a person within the State upon whom process to commence a suit may be served."

Express Co. vs. Ware, 20 Wall., 543.

"If under the laws of the domestic state the corporation has placed itself in such position that it may be served with process, it may avail itself of the statute of limitations when sued. Ability to obtain service of process is the test of the running of the statute of limitations."

Volivar vs. Cedar Works, 152 N. C., 656.

"Under such circumstances the defendant is not a non-resident within the meaning of the statute of limitations."

Sidway vs. Land Co., 187 Mo., 649.

Where "a full and perfect judgment" can not be obtained, a different rule applies.

Tioga Co. vs. Blosberh, 20 Wall., 137.

Under the authorities cited it follows that a foreign

corporation which does not comply with the laws of the State within which it is operating relating to the appointment of an agent therein upon whom process might be served, is not entitled to the bar of the statute of limitations. It has no existence within the latter State and its courts have not complete jurisdiction over it.

The evidence shows that the corporation defendant deraigned title to its Grant claim from the Corwin Trading Company, a New Hampshire corporation (Tr., p. 750) by a conveyance bearing date August 8, 1901 (Tr., pp. 433-434). This latter corporation never filed its articles of incorporation, designation of agent upon whom process might be had or any corporate statement as required by the laws of Alaska (Tr., p. 750).

This eliminates the corporation defendant's grantor, said Corwin Trading Company, as an element in its claim of adverse possession.

The evidence shows that the corporation defendant was incorporated under the laws of the State of Maine on July 26, 1901 (Tr., p. 759), and first filed its articles of incorporation and designation or appointment of W. H. Bard, as its resident agent upon whom service of process might be had, on February 8, 1904, and its corporate statement on June 4, 1904 (Tr., p. 751). It was, therefore, at this last mentioned day that the statute of limitations could first commence to run in its favor.

On February 18, 1907, said Bard was succeeded by John T. Reed, as the statutory agent of the corporation defendant (Tr., p. 755).

Both Bard and Reed left Alaska in the year 1909 (Tr., p. 616) and since that time the corporation defendant has failed to appoint a statutory agent within that district.

It thus appears that the corporation defendant first fully complied with the Alaskan laws affecting foreign corporations on June 4, 1904, and that it maintained the statutory agency until say probably end of the year 1909, or in other words, for say four and one-half years. This falls far short of the seven years' time for the running of the statute of limitations of the District of Alaska, assuming that it ran at all.

By positive statute the corporation defendant was required to continually keep an agent upon whom service could at all times be obtained and as it failed to do so as above noted, it can not claim the benefit of the statute.

If we have misconstrued the effect of Sec. 1042 of the Alaskan Code in this—that it does not form the foundation for the claim of adverse possession by a foreign corporation doing business within that district and there is no “special statute governing Alaska denying a foreign corporation within the District of Alaska the right to plead the statute of limitations,” as stated by counsel for applleants, it does not follow, as contended by them, “that a foreign corporation has

“the same right to all defenses in Alaska as any other person may have, and no distinction is made under the law.”

Sec. 15 of *Carter's Alaska Codes*, p. 147, declares that:

“If when the cause of action shall accrue against any person who shall be out of the district or concealed therein, such action may be commenced within the terms herein respectively limited, after the return of such person into the district, or the time of his concealment, and if, after such cause of action shall have accrued, such person shall depart from and reside out of this district, or conceal himself, the time of his absence or concealment shall not be deemed or taken as any part of the time limited for the commencement of such action.”

“The next question discussed in this case is that raised upon the statute of limitations, the defendant pleading an adverse possession in itself for over five years, but we are satisfied this defense is entirely unavailing to the defendant, it being a foreign corporation and hence not entitled to plead the statute. It having no existence within this State, and the courts not having complete jurisdiction over it, is barred within the provisions of Sec. 21 (Nevadan) statute, which declares: ‘If when the cause of action shall accrue against a person, he is out of the State, the action may be commenced within the term herein limited, after his return to the State; and if after the cause of action shall have accrued, he depart the State, the

time of his absence shall not be part of the time limited for the commencement of the action.' *That foreign corporations, which may never have had a legal existence within the State, are included within exceptions or statutes of this kind, is a question now very firmly settled by the authorities* (Italics ours). Thus in the case of *Olcott vs. Tioga R. R. Co.*, 20 N. Y., 210, the Court of Appeals upon a very thorough consideration of the question, and full examination of authorities, came to the conclusion that a foreign corporation came within the provisions of a statute similar to ours, and hence could not avail itself of the bar of the statute."

Robinson vs. Imperial Co., 5 Nev., 45,

cited and approved in

Barstow vs. Union Con. Co., 10 Nev., 386,
Hanchett vs. Blair, 100 Fed.

"It may be stated as a general rule that foreign corporations may, by comity only, transact business in States other than the one by virtue of the laws of which they exist. They are, therefore, citizens, so to speak, of the State by whose laws they are created, and, except by comity, have no legal existence elsewhere, and secondly, they in principle, come within the provisions of those statutes which make a saving as to absent debtors in favor of whom, so long as they remain under the jurisdiction of the State, the law of limitations does not run. *Wood on Limitations*, Sec. 250."

O'Brien vs. Big Casino Gold Mg. Co. (Cal.),
99 Pac., 210;
Pierce vs. Sou. Pac. Co., 120 Cal., 163.

The reasoning of those decisions is in no way overcome by appellants' argument and it will be seen that the provisions of the Alaskan Code are substantially similar to those of the Nevadan law. Substituted service can certainly not be an element of adverse possession. There is nothing in the evidence to show that he did not give such notice, nor can it be presumed that the Clerk of the Alaskan court failed to notify the corporation defendant of the removal of its statutory agent in 1909 as required by Sec. 366 of the Alaskan Code.

We submit that it was the duty of the corporation to maintain such statutory agency under the Alaskan Law at all events. Failing to do so it can not now avail itself of the statute of limitations under the Alaskan law, nor can it do so under the line of decisions above set forth.

XII.

NO ESTOPPEL IN PAIS HAS BEEN SHOWN TO EXIST.

The foundation of equitable estoppel is equity and good conscience.

Pomeroy Eq. Jur., par. 802.

There is a class of cases where fraudulent conduct

is essential to cases in which an owner of land is precluded from asserting his legal title by reason of intentional false representations or concealments by which another has been induced to deal with the land.

Because the doctrine is opposed to the letter of the statute of frauds, it should be carefully and sparingly applied, and only on the disclosure of clear and satisfactory grounds of justice and equity.

Pomeroy Eq. Jur., par. 807;

Storrs vs. Barber, 6 Johns Ch., 616.

It is an effort to turn the legal owner into a trustee *ex delicto* by mere words and conjecture.

The conduct must first amount to fraud in contemplation of equity as against mere silence; the record of the title would be sufficient means of knowledge on part of defendant.

There is no rule of law or equity by which an owner through mere negligence can be divested of his legal title. The conduct must be relied on and be an inducement for the other party acting, and having acted, changed his position for the worse.

Pomeroy Eq. Jur., par. 821.

Estoppel *in pais* does not arise from the conduct of silence of one party to a transaction where the other party was not misled and suffered no injury.

Columbus Co. App., 109 Fed., 177.

Even false representations to work an estoppel must be of a nature to lead a reasonably prudent person to the action taken, and must have been acted on in good faith and on ignorance of the truth.

Davis vs. Pryor, 112 Fed., 274.

Facts to constitute equitable estoppel must be proven with particularity and precision and nothing can be supplied by inference or intendment.

Standard Sanitary Co. vs. Arrott, 135 Fed., 750.

An examination of the record in this case shows that no estoppel *in pais* has been sufficiently pleaded or proved.

No change of position by the defendants can be attributed to any inaction upon the part of the plaintiff.

The record shows that the plaintiff's location was duly monumented at the time of its location (Tr., p. 216), and that its boundaries so made were preserved (Tr., p. 233).

The defendants were bound to know the boundaries of the location under which they claim.

Ricketts on Mines, Sec. 85.

The defendants had knowledge, or the means of knowledge, of the boundary line between the senior location and their own junior location. An intentional omission, however, to exercise care to ascertain such elements for the purpose of main-

taining ignorance regarding them and trespassing upon them, or a reckless disregard of them is fatal to the claim of a trespasser who invokes, as do these defendants, the claim of laches herein.

Resurrection Gold Mg. Co. vs. Fortune Gold Mg. Co., 129 Fed., 68.

"It is the duty of every one to exercise ordinary care to ascertain the boundaries of his own property, and to refrain from injuring the property of others; and the jury may legally infer that a trespasser had knowledge of the right and title of the owner of the property upon which he entered, and that he intended to violate that right and to appropriate the property to his own use from his reckless disregard of the owner's right and title, or from his failure to exercise ordinary care to discover and protect them."

Durant Mg. Co. vs. Percy Cons. Mg. Co., 93 Fed., 166, and authorities cited.

Now every trespass on the land of another that is not wilful and intentional, necessarily implies some degree of negligence.

Coal Co. vs. McMillan, 49 Md., 549.

And the rule which makes the negligent failure to discover the line of the property trespassed upon, conclusive evidence of intentional trespass, removes all room for the defense of inadvertence and honest mistake and negatives the claim of estoppel.

XIII.

LACHES AND STALE DEMANDS CAN NOT BE SET UP AS
AGAINST THE LEGAL OWNER IN POSSESSION.

We fail to discover any elements of laches in this case. It has been repeatedly stated by the Federal authorities that:

“Laches does not, like limitation, grow out of the mere passage of time. It is founded upon the inequity of permitting the claim to be enforced,—and inequity founded upon some change in the condition or relations of the property or parties. *Gallier vs. Cadwell*, 145 U. S., 368. The length of time during which a party neglects the assertion of his rights, which must pass in order to show laches, varies with the peculiar circumstances of each case, and is not, like the matter of limitations, subject to arbitrary rule. It is an equitable defense, controlled by equitable considerations; and the lapse of time must be so great, and the relations of the defendants to these rights such, that it will be inequitable to permit the plaintiff to now assert them. *Alsop vs. Riker*, 155 U. S., 461.”

Hanchett vs. Blair, 100 Fed., 827.

“Thus, inequity,” says Judge Morrow, speaking for the Court in the case last cited, “has been often held to arise from changed value of property during the time elapsing from the date of the transactions which are the subject of the suit, or from the changed relations of the parties to the property,

as when a sale has taken place, and new rights have arisen. *Hubbard vs. Trust Co.*, 30 C. C. A., 520, 528; 87 Fed., 51; *Bartlett vs. Ambrose*, 24 C. C. A., 397, 399; 78 Fed., 839. The present case is not one of the class where the value of the property has arisen greatly, or even perceptibly, while the complainant remained in reposal nor is it one where new rights have arisen, as it has not been proved that a sale has taken place to the defendant Hanchett. Each case of laches depends upon its own circumstances, and in the case at bar the complainants in action does not appear to have worked injury to anyone; nor is it shown that there was any occasion for more promptly asserting his rights."

"If the complainant's title is a legal one, capable of being established at law, the doctrine of laches and stale claim does not apply."

Higgins Oil & Fuel Co. vs. Snow, 113 Fed., 436.

In *Rukman vs. Cory*, 129 U. S., 387, the Court said:

"Laches, the Supreme Court of Illinois has well said, can not be imputed to one in the peaceable possession of land for delay in resorting to a court of equity to correct a mistake in a description of the premises in one of the conveyances through which the title must be deduced. The possession is noticed to all of the possessor's equitable rights and he needs to assert them only when he may find occasion to do so. *Wilson vs. Byers*,

77 Ill., 76, 84. See also *Barbour vs. Whitlock*, 4 T. B. Mon., 180, 195; *May vs. Fenton*, 7 J. J. Marsh, 306, 309."

It is respectfully submitted that the defendants herein have neither legal nor equitable right to the premises in controversy and that the judgment of the trial Court should be affirmed.

G. J. LOMEN,
O. D. COCHRAN,
METSON, DREW & MACKENZIE,
Attorneys for Appellees.

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

THE PACIFIC COAL AND TRANS- PORTATION COMPANY, a cor- poration, and M. D. McCUMBER,	}	No. 2150
<i>Appellants,</i>		
vs.		
PIONEER MINING COMPANY, a corporation,	}	
<i>Appellee.</i>		

SUPPLEMENTAL BRIEF FOR APPELLEE.

STATEMENT.

In addition to the matters stated in our Opening Brief relative to the jurisdiction of the trial Court, we beg to submit the following additional point which, because of the limited time allowed for the preparation of Appellee's Brief herein, was omitted therefrom.

ARGUMENT.

A COURT OF GENERAL JURISDICTION ACTING WITHIN THE SCOPE OF ITS AUTHORITY IS PRESUMED TO ACT RIGHTLY AND TO HAVE JURISDICTION TO RENDER THE JUDGMENT IT PRONOUNCES UNTIL THE CONTRARY APPEARS.

The record in the case at bar shows that the Court denied the defendant's motion for trial to a jury before the separate amended answers of the defendants were filed herein. The record does not contain the original answers of the defendants. *Non constat* the judgment of the lower Court upon the question of a jury trial, was based upon the allegations of said answers upon which the record on appeal herein is *silent*.

The District Court of Alaska which rendered the judgment herein, is a Court of general jurisdiction.

Part III, Chap. 1, Sec. 4, *Carters' Ann. Codes of Alaska*.

"Inasmuch as the District Courts of Alaska are Courts of general jurisdiction, our determination of the point must be guided by those usual rules which in the absence of a showing to the contrary, presume that courts have proceeded within the general scope of their powers, and that their orders and judgments have been given with authority."

Nelson vs. Meehan, 155 Fed., 1-5.

And the general rule is that nothing shall be intended to be out of the jurisdiction of courts of superior jurisdiction, but that which appears especially to be; that such courts of record need not affirmatively show jurisdiction, and when *silent* upon the point, every intendment is in favor of their jurisdiction and of the regularity of their proceedings.

Ency. Pl. & Pr., Vol. 12, p. 173-201;

Freemont on Judgments, Sec. 124;

Black on Judgments, Sec. 271;

Galpin vs. Page, 18 Wall. U. S., 350;

Matter of Eichoff, 101 Cal., 600;

Hersey vs. Walsh, 38 N. W., 613;

Balbridge vs. Penland, 4 S. W., 565;

Gullickson vs. Bodkin, 82 N. W., 783.

Says Mr. Justice Field of the Supreme Court of the United States (*Galpin vs. Page*, *supra*, quoted from pages 565-6):

“It is undoubtedly true that a Superior Court of general jurisdiction presiding within the general scope of its powers, is presumed to act rightly. All intendments of law in such case are in favor of its acts. It is presumed to have jurisdiction to give the judgments it renders until the contrary appears. And this presumption embraces jurisdiction not alone of the cause or subject matter of the action in which the judgment is given, but of the parties also. The former will generally appear from the character of the judgment, and will

be determined by the law creating the court or prescribing its general powers. . . . But the presumptions that the law implies in support of the judgments of superior courts of general jurisdiction only arise with respect to jurisdictional facts concerning which the record is silent. Presumptions are only indulged to supply the absence of evidence or averments respecting the facts presumed."

See, also,

Cuddy, Pet'n., 131 U. S., 285.

It is said that a judgment of a court of competent jurisdiction is always presumed to be right, and the party alleging error in the court below, must show it in the regular way in the *record*, or the presumption in favor of the correctness of the judgment will prevail.

Black on Judgments, Sec. 288;

Nelson vs. Meehan, 155 Fed., 1-5;

Hannan vs. City of Lynchburg, 33 Gratt. (Va.), 37;

Wright vs. Smith, 81 Va., 777;

Wynn vs. Henniger, 82 Va., 172;

McGirk vs. Chauvin, 3 Mo., 237.

In the case of *Fowler vs. Equitable Trust Co.*, 131 U. S., 348, upon the rendition of a decree, a petition in motion for re-hearing was filed. At the succeeding term of the Court an order was made and entered

granting a re-hearing, which order was entered as of the preceding term. The record contained no order showing the continuance of the motion and the petition for the re-hearing from the preceding term until the succeeding term.

The Supreme Court held there that—

“The presumption must be indulged in support of the action of the Court having jurisdiction of the subject-matter and of the parties—nothing to the contrary affirmatively appearing, that the facts existed which justified its action; and therefore that the Court granted the application for a re-hearing at the term at which the first decree was rendered.”

The Court further saying:

“Besides the exception taken by the defendant to the proceedings of June 30, 1885 (the subsequent term), was not in terms that the order then formally made was directed to be entered as of October 31, 1884 (the preceding term), but that it granted a re-hearing. If they intended to deny that the re-hearing had in fact been ordered at the previous term of the Court, the point should have been distinctly made upon the record.”

Paraphrasing the language of the Supreme Court in the case of *Fowler vs. Equitable Company, supra*, if appellants had intended to deny the power of the

Court to try the case without a jury "the point should have been distinctly made upon the *record*."

Nelson vs. Meehan, 155 Fed., 1-5.

"Every presumption is in favor of the validity of the judgment, and any condition of facts consistent with the validity of the judgment will be presumed to have existed, rather than one which will defeat the judgment."

Canadian, etc. Co. vs. Clarita, etc. Co., 140 Cal., 674.

"If the record is silent with respect to any fact which must have been established before the court to have rightfully acted, it will be presumed that such fact was properly brought to its knowledge."

Settlemier vs. Sullivan, 97 U. S., 444.

We submit that the jurisdiction of the lower Court upon this point should be maintained, especially so in view of the provisions of Sec. 475 of the Alaskan Code, viz:

"Any person in possession, by himself or his tenant, of real property, may maintain an action of an *equitable nature* against another who claims an estate or interest therein adverse to him, for the purpose of determining such claim, estate or interest."

a provision distinctly different from Sec. 738 of the Code of Civil Procedure of the State of California

construed in the cases relied upon by appellants in that the Alaskan Code states the character of the action which may be maintained.

Respectfully submitted.

G. J. LOMEN,
O. D. COCHRAN,
METSON, DREW & MACKENZIE,
Attorneys for Appellee.

No. 2151

United States Circuit Court of Appeals
for the Ninth Circuit.

CHARLES L. INTERMELA and the
AMERICAN SURETY COMPANY, a
corporation of the State of New York,

Plaintiffs in Error.

vs.

DAVID PERKINS,

Defendant in Error.

TRANSCRIPT OF RECORD

Upon Appeal from the United States District Court
for the Western District of Washington,
Northern Division.

RECEIVED

JUN 25 1912

D. MONKTON,
CLERK.

No.

CHARLES L. INTERMELA and the
AMERICAN SURETY COMPANY, a
corporation of the State of New York,

Plaintiffs in Error.

vs.

DAVID PERKINS,

Defendant in Error.

TRANSCRIPT OF RECORD

Upon Appeal from the United States District Court
for the Western District of Washington,
Northern Division.

INDEX.

	Page
Answer.....	11
Appearance of Attorney for Defendants.....	8
Appearance of Charles E. Shepard, and Notice....	92
Assignment of Errors.....	115
Bill of Exceptions.....	93
Bond on Writ of Error.....	124
Certificate of Clerk U. S. District Court to Record, etc.....	128
Citation on Writ of Error.....	130
Complaint.....	2
Counsel, Names and Addresses of.....	1
Decision on Merits, Memorandum.....	46
Defendants' Exhibit No. 1.....	84
Defendants' Exhibit No. 2.....	90
Exception to Entry of Findings and Judgment....	63
Exceptions to Special Finding of Facts and to Re- fusal of Court to Make Other Findings.....	67
EXHIBITS:	
Plaintiff's Exhibit "A".....	70
Plaintiff's Exhibit "B".....	72
Plaintiff's Exhibit "C".....	74
Plaintiff's Exhibit "E".....	78
Plaintiff's Exhibit "H".....	80
Defendants' Exhibit No. 1.....	84
Defendants' Exhibit No. 2.....	90
Findings of Fact Proposed by Defendants.....	51
Findings, Special.....	59
Judgment.....	62
Memorandum Decision on the Merits.....	46
Motion for Order Requiring Plaintiff to Make Com- plaint More Definite and Certain.....	9
Motion to Reverse Findings of Fact.....	64
Names and Addresses of Counsel.....	1

	Page
Opinion.....	46
Order Allowing Writ of Error, etc.....	123
Order Denying Motion for Order Requiring Plaintiff to Make Complaint More Definite and Certain and Extending Time to File and Serve Answer.....	10
Order Refusing All Special Findings of Fact, and Modifying Fifth Finding of Fact.....	65
Order Requiring Production of Certain Returns or Letters Signed by County Treasurer, etc.	45
Petition for Writ of Error, etc.	114
Plaintiff's Exhibit "A".....	70
Plaintiff's Exhibit "B".....	72
Plaintiff's Exhibit "C".....	74
Plaintiff's Exhibit "E".....	78
Plaintiff's Exhibit "H".....	80
Praecipe for Transcript.....	126
Reply.....	37
Special Findings.....	59
Stipulation Re Scope of the Admission of Defendants' Counsel Concerning Warrant No. 2, etc...	105
Stipulation That Copies of "City Ordinances" are Correct Copies, etc.	44
Stipulation Waiving Trial by Jury.....	43
Writ of Error.....	129

*In the District Court of the United States for the Western
District of Washington. Northern Division.*

DAVID PERKINS,

Plaintiff and Defendant in Error,

vs.

CHARLES L. INTERMELA and the
AMERICAN SURETY COMPANY, a
corporation of the State of New York,

Defendants and Plaintiffs in Error.

No. 1931.

NAMES AND ADDRESSES OF COUNSEL:

J. A. BENTLEY, Esq.,

Port Townsend, Washington

Attorney for Plaintiff and Defendant in Error.

CHARLES E. SHEPARD, Esq.,

614 New York Block, Seattle, Washington

Attorney for Plaintiff and Defendant in Error.

U. D. GNAGEY, Esq.,

Port Townsend, Washington

Attorney for Defendants and Plaintiffs in Error.

*In the Circuit Court of the United States for the Western
District of Washington. Northern Division.*

DAVID PERKINS,

Plaintiff,

vs.

CHARLES L. INTERMELA and THE
AMERICAN SURETY COMPANY, a
corporation of the State of New York,

Defendants.

No. 1931.

COMPLAINT.

Comes now the above named plaintiff, by J. A. Bentley, his attorney, and respectfully shows to this Honorable Court that leave to commence this action was duly granted him by this Court on the 19th day of December, 1910; that the matter in dispute in this action, exclusive of interest and costs, exceeds the sum of two thousand dollars; that the plaintiff is a citizen of the State of Massachusetts, the defendant Charles L. Intermela a citizen of the State of Washington, and the defendant, The American Surety Company, is a corporation of the State of New York.

For a cause of action against the said defendants, plaintiff alleges that the City of Port Townsend is a city of the third class with less than twenty thousand inhabitants in the County of Jefferson and State of Washington, and has been such at all the times mentioned in this complaint; that the defendant Charles L. Intermela is treasurer of said city, and has been such ever since the third day of January, 1910, at which time he succeeded himself as treasurer of said city during the full term of that office which commenced on the fifth day of January, 1909.

The plaintiff further shows that before the said defendant Charles L. Intermela entered upon his duties of treasurer of

the said City of Port Townsend for the term of office which commenced on the fourth day of January, 1910, he, with the said defendant, The American Surety Company, a corporation of the State of New York, duly executed, delivered, and filed with the City Clerk of said City of Port Townsend, his official bond in words and figures substantially as follows, to-wit:

“KNOW ALL MEN BY THESE PRESENTS: That we, CHARLES L. INTERMELA, of the City of Port Townsend, State of Washington, as principal, and the AMERICAN SURETY COMPANY of NEW YORK, a corporation organized under the laws of the State of New York and duly authorized to do a surety business and act as surety on bonds within the State of Washington, as surety, are held and firmly bound unto the City of Port Townsend, a city of the third class within the County of Jefferson, State of Washington, in the penal sum of Fifteen Thousand Dollars (\$15,000.00), gold coin of the United States of America, for which payment well and truly to be made unto the City of Port Townsend we bind ourselves, our and each of our heirs, executors, administrators and successors, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 22nd day of December, 1909.

NOW the condition of the above obligation is such, That WHEREAS, the said Charles L. Intermela was, by the citizens of the said City of Port Townsend, on the 7th day of December, 1909, duly elected at a regular election duly held, to the office of City Treasurer of the City of Port Townsend aforesaid, for the year beginning January 4th, 1910, and until his successor shall be duly elected and qualified.

NOW, THEREFORE, if the said Charles L. Intermela shall faithfully perform all of his duties as such Treasurer of the said City of Port Townsend according to law and City Ordinances of said city, and including all of his duties of all offices of which he is ex-officio incumbent and also including the faithful discharge of all duties which may be required of said

City Treasurer by any law enacted subsequent to the execution and delivery of this obligation, and shall account for and pay over all money which may come into his hands as such Treasurer, then this obligation to be void; otherwise to remain in full force and effect.

IN WITNESS WHEREOF, the seal and signature of said principal is hereto affixed, and the corporate seal and name of said surety is hereunto affixed and attested by its duly authorized officers.

CHARLES L. INTERMELA,

AMERICAN SURETY COMPANY OF NEW YORK.

(Seal)

By R. D. Weldon, Resident Vice-President.

Attest: F. L. Hemming, Resident Assistant Secretary.

Witness: Jas. W. B. Scott.

The plaintiff further shows that the said City of Port Townsend, on the 18th day of February, 1898, duly issued and delivered to Alonzo Elliott, a citizen of the State of New Hampshire, a warrant upon the City Treasurer of said City for the sum of fifteen hundred and forty-eight dollars and twelve cents, payable with six per cent interest per annum out of the indebtedness fund of said City; which said warrant is substantially in the following words and figures, viz.:

\$1548.12. Port Townsend, Wash., Feby. 18th, 1898. No. 2.

By order of CITY COUNCIL, Feby. 17th, A. D. 1898, of the CITY of PORT TOWNSEND, WASH.

The Treasurer of said City will pay Alonzo Elliott, or order, Fifteen Hundred and forty-eight—12/100 Dollars. For full satisfaction of judgment of Alonzo Elliott vs. City of Port Townsend, with interest at 6% per a

Indebtedness Fund

August Duddenhausen,

City Clerk.

D. H. HILL,

Mayor of the City of Port Townsend.

(Endorsed on the back)

Presented Feb. 19, 1898. Not paid for want of funds.

JOHN SIEBENBAUM,
City Treasurer.

Without recourse

A. Elliott.

The plaintiff further shows that on the 19th day of February, 1898, after said warrant had been so issued and delivered to said Alonzo Elliott, said Elliott presented the same to the treasurer of said City of Port Townsend and demanded payment thereof; that said treasurer refused to pay the same for want of funds, and then and there endorsed upon the back of said warrant the following words and figures, viz.:

“Presented Feby. 19, 1898.

Not paid for want of funds.

John Siebenbaum, City Treasurer.”

The plaintiff further shows that after the said warrant had been so as aforesaid endorsed by said City Treasurer the said Alonzo Elliott, for value, duly endorsed and transferred the same to the plaintiff, who is now the holder and owner thereof and was such owner on and before the 1st day of December, 1910; and there was on said day due and owing to the plaintiff upon said warrant the principal sum of fifteen hundred and forty-eight dollars and twelve cents and the sum of eleven hundred and eighty-seven dollars and forty cents interest thereupon from the 19th day of February, 1898, at the rate of six per cent per annum, amounting altogether to the sum of twenty-seven hundred and thirty-five dollars and fifty-two cents.

The plaintiff further shows that on said 1st day of December, 1910, and for several months prior thereto, there was and had been in the hands of the defendant Charles L. Intermela as treasurer of the said City of Port Townsend, money belonging to the indebtedness fund of said city sufficient to pay the

plaintiff's said warrant both principal and interest in full, after deducting from the total amount of money in his hands belonging to said indebtedness fund of the city a sufficient sum to fully pay all warrants, certificates and other obligations and indebtedness of said city which by law are or were entitled to be paid out of the indebtedness fund of said city, before the payment of the plaintiff's warrant out of the moneys belonging to such fund.

The plaintiff further shows: that all of the warrants, certificates and other obligations and indebtedness of said City of Port Townsend which have or had preference over the plaintiff's said warrant for payment out of money in the city treasury of said city belonging to the indebtedness fund of said city were called in for payment or had been paid by the treasurer of said city long prior to the fourth day of January, 1910, and the plaintiff's said warrant is next in order of number and date after the warrants, certificates and other obligations and indebtedness of the said city so as aforesaid called in, or paid.

The plaintiff further shows that long before the said first day of December, 1910, it became and continued to be the duty of said Charles L. Intermela as treasurer of said City of Port Townsend to call in the plaintiff's said warrant for payment, but he failed and neglected so to do; that on the aforesaid 1st day of December, 1910, he presented his above mentioned warrant to the defendant Charles L. Intermela, as treasurer of said City of Port Townsend, at his office in said city and demanded payment thereof; that it was then and there the duty of said Intermela as such treasurer to pay the same, nevertheless he refused to make payment of said warrant, or any part thereof. Whereby, on the said first day of December, 1910, the said defendants became indebted to the plaintiff upon the aforesaid bond in the sum of two thousand seven hundred and thirty-five dollars and fifty-two cents.

WHEREFORE, in consideration of the premises, the plaintiff prays judgment against the defendants for the sum of two thousand seven hundred and thirty-five dollars and fifty-two

cents and interest thereon from the first day of December, 1910, besides his costs and disbursements in this action.

Dated December 19th, 1910.

J. A. BENTLEY,
Attorney for Plaintiff.

State of Washington,
County of King.—ss.

J. A. BENTLEY, first being duly sworn, deposes and says that he is the attorney for the plaintiff in the foregoing complaint described; that the reason for affiant making this verification is that said plaintiff is not within the County of King, but in the State of Massachusetts his place of residence; and affiant says that he verily believes that the statements made in the foregoing complaint are true.

J. A. BENTLEY,

Subscribed and sworn to before the undersigned this 19th day of December, 1910.

(Seal)

R. S. BLOSS.

Indorsed: Complaint. Filed U. S. Circuit Court, Western District of Washington, Dec. 19, 1910. Sam'l D. Bridges, Clerk. W. D. Covington, Deputy.

*In the United States Circuit Court for the Western District of
Washington. Northern Division.*

DAVID PERKINS,

Plaintiff,

vs.

CHARLES L. INTERMELA and THE
AMERICAN SURETY COMPANY of
New York, a corporation,

Defendants.

No. 1931.

APPEARANCE.

To the Clerk of the Above-Entitled Court:

You will please enter my appearance as attorney for the defendant Charles L. Intermela and The American Surety Company in the above entitled cause. Service of all subsequent papers, except writs and process, may be made upon said defendants by leaving the same with

U. D. GNAGEY,

P. O. Address: Port Townsend, Washington.

Indorsed: Appearance. Filed U. S. Circuit Court, Western District of Washington, Jan. 9, 1911. Sam'l D. Bridges, Clerk. W. D. Covington, Deputy.

*In the Circuit Court of the United States for the Western
District of Washington. Northern Division.*

DAVID PERKINS,

Plaintiff,

vs.

CHARLES L. INTERMELA and THE
AMERICAN SURETY COMPANY, a
corporation of the State of New York,
Defendants.

No. 1931.

MOTION.

Come now the defendants herein by their attorney U. D. Gnagey and move the court for an order requiring the plaintiff to make his complaint more definite and certain in the following respects:

First: By stating in the paragraph on page five of said complaint commencing with the eighth line thereof and ending with the twentieth, whether the moneys claimed by plaintiff to have been in the hands of said Charles L. Intermela belonging to the indebtedness fund, were actually placed in the said indebtedness fund by said defendant Intermela, or were by said defendant placed in another fund, and if it is claimed by said plaintiff that moneys belonging to said indebtedness fund were by him placed in some other fund, by stating from what source such moneys were derived and in what fund they were placed.

Second: By stating, in the paragraph on page six of said complaint beginning with the first line thereof and ending with the fifteenth, the facts which plaintiff claims made it the duty of said defendant Intermela as treasurer to call plaintiff's purported warrant, and by further stating the time when such facts arose.

U. D. GNAGEY,
Attorney for Defendants.

Indorsed: Motion to Make Complaint More Definite and Certain. Filed U. S. Circuit Court, Western District of Washington, Jan. 9, 1911. Sam'l D. Bridges, Clerk. W. D. Covington, Deputy.

In the Circuit Court of the United States in and for the Western District of Washington. Northern Division.

DAVID PERKINS,

Plaintiff,

vs.

CHARLES L. INTERMELA and THE
AMERICAN SURETY COMPANY, a
corporation of the State of New York,
Defendants.

No. 1931.

ORDER.

Now on this day this cause comes on to be heard upon motion of the defendants for an order requiring plaintiff to make his complaint more definite and certain; the Court after hearing argument of respective counsel and being fully advised in the premises denies said motion.

Upon motion of defendants' attorney in open court for fifteen (15) days' time to answer the plaintiff's complaint, plaintiff's counsel consenting thereto, it is hereby ordered that the defendants have until January 31, 1911, to file and serve upon plaintiff's attorney their answer to the complaint.

Dated this 16th day of January, 1911.

C. H. HANFORD, Judge.

Indorsed: Order. Filed U. S. Circuit Court, Western District of Washington, Jan. 16, 1911. Sam'l D. Bridges, Clerk. W. D. Covington, Deputy.

*In the United States Circuit Court for the Western District of
Washington. Northern Division.*

DAVID PERKINS,

Plaintiff,

vs.

CHARLES INTERMELA and THE
AMERICAN SURETY COMPANY, a
corporation of the State of New York,
Defendants.

No. 1931.

ANSWER OF DEFENDANTS.

Come now the defendants in the above-named cause Charles Intermela and the American Surety Company and for answer to plaintiff's complaint herein, admit each and every allegation contained in said complaint from the beginning thereof down to and including the twenty-second line on the third page thereof, but deny each and every other allegation therein contained, except such as are hereinafter admitted or set forth.

As a First Affirmative Defense to the said Action the said defendants allege as follows:

I.

That the City of Port Townsend, Washington, was duly incorporated by the act of the Legislative Assembly of the Territory of Washington entitled "An Act to incorporate the City of Port Townsend," approved on the 29th day of November, 1881, and the act amendatory thereto entitled "An Act to amend an act to incorporate the City of Port Townsend, Washington," approved November 28, 1883; and on August 16, 1896, the said city was duly re-incorporated under the general laws of the State of Washington, as a city of the third class and ever since said date has been and now is a city of the third class in said state.

2.

That the warrant described in plaintiff's complaint, as shown on the face of said warrant and as alleged in said complaint, was issued in satisfaction of a judgment in the case of Alonzo Elliott against the City of Port Townsend; that said cause was numbered 1784 of the Superior Court of the State of Washington for the County of Jefferson, in which said cause Alonzo Elliott was plaintiff and the said City of Port Townsend was defendant; and that said judgment was rendered on November 16, 1897, upon a complaint according to the prayer thereof, of which the following is a true copy, to-wit:

In the Superior Court of the State of Washington for the County of Jefferson.

ALONZO ELLIOTT,

vs.

THE CITY OF PORT TOWNSEND, a
municipal corporation,

Plaintiff,

Defendant.

No. 1784.

COMPLAINT.

Now comes the above named plaintiff and complains of the above named defendant and for a cause of action against said defendant alleges and says as follows:

I.

That the above named defendant the City of Port Townsend was duly created and incorporated under an act of the legislative assembly of the Territory of Washington, entitled, "An Act to incorporate the City of Port Townsend," approved November 29th, 1881, and that the boundaries and limits of said defendant were revised and re-established by an act of the legislative assembly of the Territory of Washington, entitled

"An Act to amend an act to incorporate the City of Port Townsend," which act was approved November 28th, 1883, and that the said defendant existed as a municipal corporation under the said act approved November 29th, 1881, and the amendment thereto, approved November 28th, 1883, until December, 1896, when, conformable to the provisions of Section 10 of Article XI. of the Constitution of the State of Washington, and an act of the legislature of the State of Washington, approved March 27th, 1890, entitled, "An Act providing for the organization, classification, incorporation and government of municipal corporations, and declaring an emergency," and all amendments thereto, duly reincorporated, then taking all necessary steps therefor, and completing the said reincorporation, and that the said defendant at all of said times has been duly organized and incorporated as the identical municipal corporation theretofore incorporated and existing under the statutes and acts aforesaid, with the ordinances passed prior to such reorganization remaining in full force and effect, and succeeding to all the rights, privileges and obligations enjoyed and sustained by the said original corporation.

II.

That in and by section 2 of chapter one of the act of the legislative assembly of the Territory of Washington, entitled, "An Act to incorporate the City of Port Townsend," approved November 29th, 1881, it was provided that the said defendant may sue and be sued, plead or be interpleaded in all courts of justice, contract and be contracted with; and in and by section 7 in chapter 2 of said act approved November 29th, 1881, the said defendant was given and granted power to provide for clearing, opening, gravelling, improving and repairing streets, highways and alleys, and for the prevention and removal of all obstructions therefrom, or from any cross or sidewalks, and to provide for clearing streets, also for constructing sewers and cleaning and repairing the same, and to assess, levy and collect each year a road poll tax of not less than four nor more than six dollars on every male inhabitant of the said defendant

between the ages of 21 and 50 years, except persons that are a public charge, and also a special tax on property of not less than two nor more than four mills on every dollar's worth of property within the city, which taxes shall all be expended for the purposes specified in said sections and included in this paragraph as grants of power to the said defendant. And by and in section eight of the said act approved November 29th, 1881, the said defendant has power conferred upon it to construct and repair sidewalks, and to grub, pave, grade, macadamize and gutter any street, highway or alley therein, and to levy and collect a special tax or assessment on the lots and parcels of land fronting on such street, highway or alley sufficient to pay the expense of such improvement; provided, that unless the owners of more than one-half of the property subject to assessment for such improvement petition the council to make the same such improvement shall not be made unless five members of the council by vote assent to the making of the same. And in and by section ten of said act approved November 29th, 1881, the said defendant was given and granted power by general ordinances to prescribe the mode in which the charge on the respective owners or lots or land and on the lots or land shall be assessed and determined for the purposes authorized by said act, as herein set out, and that such charge when assessed shall be payable by the owner or owners at the time of the assessment personally, and shall also be a lien upon the respective lots or parcels of land from the time of the assessments, and that such charge may be collected and such lien may be enforced by a proceeding in law or in equity either in the name of the said defendant or in the name of the officer to whom it might direct payment to be made; and further, that in cases where an assessment was regularly made under the said act and payment thereof neglected or refused at the time when the same became due, the said defendant was entitled to demand and recover, in addition to the amount assessed and interest thereon at ten per cent. per annum from the time of such assessment, five per cent. to defray the expenses of col-

lection, which sum by said act was to be included in any judgment or decree which might be rendered in any suit brought for the collection thereof; and it was further provided in the said act, in section 109 thereof, that it, the said act, as a whole should take effect and be in force from and after the second day of January, A. D. 1881.

III.

That on the 31st day of April, 1885, the Common Council of the said City of Port Townsend duly and regularly passed an ordinance entitled "An Ordinance to provide for contracts for street improvements," which ordinance is numbered 117, and was on the 4th day of April, 1885, duly approved by the mayor of said city, and immediately upon said approval became operative and has ever since been and still is in full force and effect, which ordinance is in words as follows:

"Ordinance No. 117.

To Provide for contracts for street improvements.

The City of Port Townsend does ordain as follows:

Section 1. That within twenty days after the passage of any ordinance for curbing, paving, grading, filling, macadamizing or guttering any street, highway or alley in the City of Port Townsend, or for the construction or repair of any sidewalk in any such street, highway or alley, the city surveyor shall prepare and submit to the common council all necessary plans, specifications and estimates for such improvements, and such plans, specifications and estimates, when approved by said common council, shall be filed with the city clerk.

Sec. 2. That within three days after the filing of such plans, specifications and estimates, the clerk shall advertise a notice calling for sealed bids for such improvements to be made according to such plans, specifications and estimates. Such notice shall be published for five days successively in any newspaper published in the city. All bids must be filed in the office of the clerk on or prior to a day to be specified in such notice, and the clerk shall endorse on the envelope or cover of each

bid the date of filing the same; and he shall receive no bids after the day specified in such notice for receiving the same. Provided, that if no bid shall be received and accepted by the council in response to such notice, the clerk shall immediately advertise a similar notice, and he shall so advertise as many times as may be necessary, or until a contract shall be awarded for such improvement, unless otherwise ordered by the council, and shall receive bids in the same manner and subject to all **the provisions of this ordinance**, as in the case of the original call for bids.

Sec. 3. That at the first meeting of the Council after the time specified in any notice for bids, the Council shall open and consider all bids received, and may reject any and all, or may accept that of the lowest responsible bidder or bidders, and award a contract thereon. And the Council may, if deemed advisable, at the times of awarding any contract under the provisions of this ordinance, require the contractor or contractors to give a bond to the City of Port Townsend in any sum to be specified with sufficient sureties, to be approved by the mayor, conditioned for the faithful execution of the terms of the contract.

Sec. 4. That when any bid shall have been accepted by the Council, and a contract awarded thereon, such contract shall be reduced to writing and signed by the contractor or contractors, and by the mayor and clerk in behalf of the City, and sealed with the corporate seal of the city in duplicate, and one of the originals of such contract shall be filed with the clerk, and authority to sign such contract on behalf of the city is hereby conferred upon the mayor and clerk.

Sec. 5. That this ordinance shall take effect and be in force at and after five days after the same shall have been published.

Passed the Council April 3, 1885.

Approved April 4, 1885.

C. M. BRADSHAW, Mayor.

J. J. CALHOUN, City Clerk.

IV.

That on the 4th day of March, 1887, the said Common Council duly and regularly ordained and passed ordinance number 160 of the records of the said defendant, which ordinance is entitled "An ordinance prescribing the mode in which the charge on the respective owners of lots and lands, and on the lots and lands shall be assessed, determined and collected for street improvements," which ordinance is in words as follows:

"Ordinance No. 160.

AN ORDINANCE prescribing the mode in which the charge on the respective owners of lots and lands, and on the lots and lands shall be assessed, determined and collected for street improvements.

The City of Port Townsend does ordain as follows:

Section 1. That whenever the Common Council of the City of Port Townsend shall cause any part of any street, highway or alley therein to be curbed, paved, graded, macadamized or guttered, or cause any sidewalks to be constructed or repaired in any street, highway or alley in said city, the whole cost of such improvement shall be levied and become a lien upon the taxable real estate fronting on such street or alley as may be improved, and as may be without any assessment district established as hereinafter provided; provided, that if the city council at any one time cause two or more intersecting streets to be improved, the cost of so improving the area of the intersections shall be equally divided between the property fronting on each of said intersecting streets.

Sec. 2. That all assessments for such improvements shall be according to value, so that each lot or other smallest subdivision of real estate subject to assessment, shall be held for such portion of the whole cost of the improvement within an assessment district, as the value of such lot or smallest subdivision of real estate bears to the aggregate value of the assessable property within said assessment district. And as fix-

ing values, all improvements upon real estate shall be excluded, and the lands only shall be assessed; and the cost of any such improvement shall include all lawful charges and expenses incident to such improvement, and of making and collecting the assessment therefor.

Sec. 3. That the property fronting on any such improvement and subject to assessment therefor, shall constitute a special assessment district, and the boundaries of such assessment district shall be lines running parallel with the street to be improved through the middle of the tier of blocks fronting on such street, each side of the same; and in case the land so fronting is not parallel into blocks, then such line shall run parallel with the street so improved, at a distance of 110 feet from the boundary line between such street and the property abutting them, and such lines shall close with lines at right angles with such street across each terminus of the improvement. Provided, if the council shall at any one time cause two or more streets to be improved, districts shall nevertheless be formed with boundaries as herein provided, so that a separate district shall be formed for each street so improved. Provided, further, that when any street or any part thereof, shall be ordered improved, and such improvement is not to be of uniform character along the whole line of such improvement, then such improvement shall be divided into separate assessment districts so that each assessment district shall include only improvements of uniform character as near as may be.

This provision shall apply to the grading or other improvement of the road-bed of the street, and sidewalks, or to both, as the case may be, as that separate distance may be found for each kind of improvement, if deemed advisable by the council. In case more than one assessment district shall be required as above provided, or in any case the council shall deem it advisable to make separate districts for the different kinds of improvements, the length and nature of each assessment district shall be fixed by an order of the council at the time of

the equalizing of the assessment, as provided by section 6 of this ordinance.

Sec. 4. That within twenty days after the council shall have passed an ordinance for such improvement of any street, highway or alley, the city surveyor shall prepare and file with the clerk a plat of the street or streets so to be improved, and of the real estate subject to assessment therefor, showing the lines of each lot or smallest subdivision thereof; and within ten days thereafter the city assessor shall prepare and file with the clerk an assessment roll for the district, or an assessment roll for each of said assessment districts, if several streets are to be improved at the same time, upon which assessment roll each lot or smallest subdivision of real estate in such district shall be listed in the name of the owner thereof, if known, or as "unknown" and assessed at the actual cash value thereof, and such assessment roll shall be open for public inspection at the clerk's office from the filing thereof until the day of meeting of the council for equalization thereof, as herein provided.

Sec. 5. That within three days of the filing of such assessment roll, the clerk shall advertise a notice in some newspaper published in the city, to the effect that such assessment roll (describing it), has been filed in his office, that the same is open to public inspection and that any person feeling himself aggrieved by such assessment may apply to the Common Council to have the same corrected at a meeting of the council to be designated in such notice, which meeting shall be the first regular meeting after the last publication of such notice, and such notice shall be published for ten days in successive issues of said newspaper.

Sec. 6. That at the first regular meeting of the Common Council after the last publication of such notice, the Common Council shall equalize such assessment and shall hear all complaints concerning such assessment roll and determine the same, and may raise or lower the valuation of any lot or parcel of real estate listed on such assessment roll, so as to make the

assessment equal and uniform, as near as may be, upon all property in the district, and shall, if any lot or parcel of real estate in such district be found to have been omitted from such assessment roll list the same and place a just valuation thereon. Provided that valuation of any lot or parcel of real estate shall not be raised by the council without the owner's consent, until at least twenty-four hours after a written notice of such proposed change shall have been served upon the owner, or his agent, if such owner or agent can be found within the city, if not so found then a notice of such proposed change in the assessment roll must be published for at least three days in some newspaper published in the city, and the council may adjourn from time to time if necessary, until the regulation of such assessment roll is completed.

Sec. 7. That as soon as practicable after such assessment shall be equalized, and the nature and extent of assessment district shall have been fixed, and the cost of the improvement shall have been ascertained, the council shall by an order fix the rate of assessment for such district, or for each of such districts, as the case may be, so as to raise the necessary amount to pay for such improvement, in accordance with the provisions of this ordinance.

Sec. 8. That within ten days after the council shall have so fixed the rate of assessment for any district, the clerk shall extend upon the assessment roll for the same amount of the assessment upon such lot or parcel of real estate listed thereon, and prepare a duplicate of such assessment roll and deliver the same to the city treasurer, who shall within three days thereafter publish a notice in some newspaper published in the city, to the effect that all assessments upon such roll must be paid to him within thirty days after the first publication of such notice, or the same will become delinquent. Such notice shall be published for three days.

Sec. 9. That all assessments shall be collected by the treasurer, and if not collected within the time prescribed in the preceding section, the same shall then become delinquent,

and the same with interest, penalty and costs shall be collected by suit in foreclosure of the lien for the same in accordance with the provisions of the charter of the city.

Sec. 10. That this ordinance shall take effect and be in force at and after five days after the same shall have been published.

Passed the Council March 4, 1887.

Approved March 4, 1887.

D. W. SMITH, Mayor."

V.

That upon the petition to the said Common Council to make the same of the owners of more than one-half of the property subject to assessment therefor, the said Common Council, on or about the 31st day of August, 1888, by a vote of five members of said Council voting in the affirmative, duly and regularly determined to make an improvement on that part of Washington Street, between Taylor and Harrison Streets, within said city, and for that purpose duly and regularly ordained and passed ordinance number 212; that said ordinance on August 31st, 1888, was duly approved by the Mayor of said city and thereupon became operative and has ever since been and still is in full force; that the ordinance in this paragraph referred to is entitled "An ordinance for grading portions of Washington Street in the City of Port Townsend," and is in words as follows:

"Ordinance No. 212.

AN ORDINANCE for grading portions of Washington Street in the City of Port Townsend.

The City of Port Townsend does ordain as follows:

Section 1. That Washington Street from the easterly side of Taylor Street to the easterly side of Harrison Street be graded to the grade of said Washington Street as established by ordinance No. 201.

Sec. 2. That all lots and parcels of land fronting on said Washington Street as herein ordained, viz.: from the easterly side of Taylor Street to the easterly side of Harrison Street be and the same is hereby declared to be an assessment district for the purpose of this ordinance.

Sec. 3. This ordinance to take effect and be in force from and after five days from its publication.

Passed the Council Aug. 31, 1888.

Approved Aug. 31, 1888.

W. H. H. LEARNED, Mayor.

Attest: JAMES SEAVEY, City Clerk."

VI.

That within twenty days after the passage of said ordinance No. 212, referred to and set out in the next preceding paragraph the duly elected, qualified and acting city surveyor of the said defendant, agreeable and pursuant to said ordinance No. 117, prepared and submitted to the Common Council of the said defendant all necessary plans, specifications and estimates for the improvement and grading of the said Washington Street, as provided for in said ordinance No. 212, and such plans, specifications and estimates were by the said Common Council duly considered and approved and thereafter filed with the city clerk of the said defendant.

VII.

That within three days after the filing of said plans, specifications and estimates with him as aforesaid, the clerk of the said defendant duly caused to be published for five days successively in a newspaper published and printed within the limits of the said defendant, a notice calling for sealed bids for the improvement provided for by the passage of said ordinance No. 212, as aforesaid, to be made according to the plans, specifications and estimates filed with the clerk as aforesaid, which notice was in due form and specified a day prior to which

sealed bids made pursuant thereto should be filed with the clerk of the said defendant.

VIII.

That within the time limited in said notice so published by the clerk as aforesaid for the filing of sealed bids with him, one W. C. Williams, agreeable to the provisions of said ordinance No. 117, and in answer to the said notice, and agreeable to the provisions thereof, did submit in writing his bid for making the said improvement, which bid conformed to the requirements of the said notice and was duly sealed, and duly caused the same to be filed in the office of the clerk of the said defendant, and that the clerk thereupon duly endorsed upon the cover of the said bid the date of the filing of the same, which date was subsequent to the first day of the publication of the said notice and prior to the date limited therein for the filing of such bids.

IX.

That at the first meeting of the Common Council of the said defendant held subsequent to the time specified in the said notice after which bids thereunder should not be received, the said Common Council duly opened and considered all of the bids filed with the clerk for the said improvement agreeable to the terms of the said notice, and then and there accepted as the lowest responsible bidder for the making of the said improvement the bid of the said W. C. Williams and awarded him a contract for the making of the said improvement under the authority of the said ordinance No. 117, and thereafter and in pursuance of the said acceptance and award the said defendant and the said W. C. Williams duly entered into a contract in writing, which contract was duly signed by the said W. C. Williams and by the mayor and the clerk of the said defendant in behalf of the said defendant, and under the corporate seal of the said defendant, in duplicate, which contract is in words and figures as follows:

"This agreement made and entered into this 15th day of October, 1888, by and between the municipal corporation, the City of Port Townsend, the party of the first part and W. C. Williams of Seattle, W. T'y, the party of the second part,

Witnesseth that whereas the said party of the first part by order and resolution duly passed by its Common Council at a regular session thereof held on the 21st day of September, 1888, did invite and call for bids and proposals to do certain work on Washington Street in said city which is more fully described hereinafter, and whereas the said city by its Common Council did on the 1st day of October, 1888, at a regular session of said council accept the bids for said work and regularly offered and filed by said party of the second part he being the lowest responsible bidder for said work and

Whereas the said city through its said council thereupon and thereafter duly authorized a contract to be entered into between said city and said second party for the doing of said work and instructed the mayor and clerk to sign and execute said contract on the part of said city,

Now therefore it is hereby agreed by and between the said parties hereto that said party of the second part for the consideration hereinafter named agrees that he will do the work of grading Washington Street in said city from the easterly side of Taylor to the east side of Harrison Streets in said city according to the plans and specifications made by the city surveyor and accepted by the party of the first part and now on file with the clerk of said first party.

It being expressly agreed, understood and covenanted that the bulkinh heading set forth in said plans and specifications is considered as, treated as, and is a part of the grading of said street and that said bulkheading is to be as in said plans and specifications set forth, and it is hereby agreed that the specifications and plans hereinbefore referred to are made part of and are a part and parcel of this agreement.

And it is hereby agreed by said second party to do said work of grading, including bulkheading, in a good workman-

like manner and according to plans and specifications afore-said and to the satisfaction of said party of the first part, its Common Council and the committee on streets of said first party. And the said work of grading, including bulkheading, to be fully done and completed within seventy (70) days from the date of the execution of this contract. And the said party of the first part agrees to pay to the said second party, and the said party of the second part agrees to accept as compensation therefor, at the rate of forty-nine (49) cents per cubic yard of earth in all excavations completing said grade from east side of Taylor to the east side of Harrison Street, and for cribbing and bulkheading seventeen and seventy-five one-hundredths dollars (\$17.75) per thousand feet for all lumber used in bulkheading or cribbing. Warrants or orders of said city, drawn upon the Washington Street Improvement Fund as follows: At the first regular meeting of the Common Council in the month of December, A. D. 1888, seventy-five (75) per cent. of the contract price for such portion of the work as the city surveyor and committee on streets shall certify to have been completed up to December 1st, 1888, and for the balance of said contract price at the first regular meeting of the Council after the completion of said improvement and approved by said surveyor and said Council.

In witness whereof said party of the first part has caused these presents to be signed by its Mayor and City Clerk and sealed with its seal this day of October, A. D. 1888.

W. H. H. LARNED, Mayor.	(Seal)
JAMES SEAVEY, Clerk.	(Seal)
W. C. WILLIAMS.	(Seal)

Signed, sealed in presence of

(Corporate Seal)

W. F. LEARNED,
 GEO. H. JONES.
 H. H. AMES,
 CHAS. K. JENNER,
 As to W. C. Williams."

X.

That the said W. C. Williams fully complied with the requirements of the said ordinance No. 117 in regard to such contracts, and did in pursuance of the requirements of the said Common Council duly execute and deliver his bond with good and sufficient sureties to the defendant in the sum specified by the said defendant, conditioned for the faithful execution of the terms of the contract set out in the next preceding paragraph, which bond was duly presented to and approved by the Mayor of the said defendant.

XI.

That pursuant to his contract with the city the said W. C. Williams entered upon the execution thereof and completed the said improvement according to the terms of his said contract and the ordinances relating to the same, and fully complied with all the terms and conditions of the said contract under the supervision of the street committee and the city surveyor of the said defendant, and that thereafter the said defendant and the said W. C. Williams met together and had a settlement for and concerning the work done under the said contract, and that the said defendant by its proper officers and agents duly accepted the said work and acknowledged the full performance and completion of the said contract according to its terms by the said W. C. Williams, and he and his sureties upon the said bond were duly released and discharged.

XII.

That after the completion of the said improvement and the full performance of the said contract by the said W. C. Williams as aforesaid, the said defendant issued, among others, to him, as a voucher for money due for services rendered under the said contract a certain street improvement warrant, numbered 19, dated February the 11th, 1889, for the sum of one thousand dollars, which street improvement warrant is in the words and figures as follows:

"No. 19.

City of Port Townsend, W. T., February 11th, A. D. 1889.

By order of City Council of February 9th, A. D. 1889, The Treasurer of the City of Port Townsend, Washington Territory: Pay to W. C. Williams or order, one thousand 00/100 dollars, and charge the same to the account of Washington Street Improvement Fund. The City of Port Townsend hereby guarantees the payment of said sum of \$1000.00 with interest thereon at ten per cent. per annum payable semi-annually.

W. H. H. LEARNED,

Mayor of the City of Port Townsend.

\$1000.00/100.

Attest: JAMES SEAVEY, City Clerk."

XIII.

That thereafter on the 14th day of February, A. D. 1889, the said warrant was duly presented to the said defendant and to the duly qualified and acting treasurer thereof for payment, and that payment thereof was refused for want of funds, and the fact of such presentation and refusal of payment for said cause was endorsed on the back of the said warrant by the said city treasurer under date of the said 14th day of February, A. D. 1889.

XIV.

That after the said warrant was issued and prior to the demand hereinafter alleged, for a valuable consideration, the said warrant was assigned by the said W. C. Williams to this plaintiff, together with all demands and causes of action thereon or thereunder, including the demands evidenced thereby against the said fund required by said ordinance to be provided for the payment of the same, and the right of action thereon against the said City of Port Townsend for failure to provide the said fund, were transferred and made over to this plaintiff, and this plaintiff has ever since been and now is the

owner and holder of the said warrant and the said rights and privileges.

XV.

That no payments whatsoever have been made upon the said warrant, except that interest has been paid thereon to the 11th day of August, 1892.

XVI.

That at divers and sundry times since the said warrant was first presented for payment as aforesaid and payment thereof refused, the said defendant has been requested by the plaintiff to provide a fund for the payment of the said warrant, which it the said defendant has at all times neglected and refused to do.

XVII.

That by virtue of its charter and of the said ordinances No. 160 and No. 212 heretofore pleaded, the said City of Port Townsend was and is charged with the duty of constituting a special assessment district consisting of the property fronting upon said improvement and establish boundaries of such district embracing the property abutting upon the portion of Washington street improved as aforesaid. and of levying an assessment upon the property included within the bounds of such improvement district sufficient in amount to pay the contract price of said improvement, the contract price being a sum not exceeding the amount of said warrant and all other warrants issued for said improvement, and was and is also so charged with the duty of collecting such assessment after the levy thereof, thereby creating the fund referred to in said warrant.

XVIII.

That under and by virtue of its charter and said ordinances number 160 and 212 and the law in that behalf provided, the said defendant constituted such a special assessment district as it was required to do, including the property fronting and

abutting upon that portion of Washington Street improved as aforesaid, and pretended to file a plat of the said street so to be improved as aforesaid, and the real estate subject to assessment therefor, and in part only complied with the provisions of said ordinances for assessing the cost of said improvement upon the property embraced within the said improvement district, and although often requested so to do by the said plaintiff the said defendant has at all times failed and refused and still fails and refuses to comply with the provisions of the said ordinances and its said charter and assess the amount of said improvement or cause the same to be extended upon the assessment roll of the said defendant, or prepare a duplicate assessment roll and deliver the same to the treasurer of the said city, or take any step whatsoever for the due and legal assessment of the said property or the collection of the amount of the cost of said improvement as by said ordinance provided, and that there is no money whatsoever in the said fund for the payment of the said warrant or any part thereof, and that the said defendant has wholly failed and neglected and refused to comply with any of the provisions and terms of said contract or the said ordinances in that behalf.

XIX.

That since the date of the said contract and the date of the completion thereof the property adjoining and fronting upon said improvement has greatly depreciated in value, and has in many instances become subject to liens for delinquent taxes, and has been sold and encumbered by different owners thereof, and that by reason of the defendant failing to make the assessment and collect the same with which to pay the cost of said improvement, and by reason of the defendant's neglect and failure to properly make assessment of the amount of said improvement, the means of payment of the cost of said improvement under and by virtue of the charter of the said defendant and the statute in that behalf provided, have been wholly lost to the plaintiff and his assignor, and that the said plaintiff and his

assignor have at all times used due diligence in demanding the collection of the said assessment of the said defendant and are without fault in the premises.

XX.

That for the purpose of inducing the said W. C. Williams and his assignee to rely upon its good faith in the premises and upon its purpose to make payment for the said improvement, and to induce the said W. C. Williams to enter into said contract, and as an assurance that the said assessment would be by the said defendant levied promptly and duly collected and paid, the defendant at the time of making the said contract offered to guarantee the payment of the said warrant, with interest thereon as specified therein, and did in pursuance of the said representation so indicate and promise in said warrant, and relying upon said representations on the part of the said defendant the plaintiff and his assignor were led to believe and did believe that the said defendant would cause said assessment to be duly and legally made, levied and collected and expended by the defendant in the payment of the said warrant and the indebtedness evidenced thereby.

XXI.

That at the time of incurring the said indebtedness for the said improvement as aforesaid the indebtedness of said defendant was not equal to one and one-half per cent. of the value of its taxable property, and that, too, including the amount of the indebtedness incurred by it on account of the said improvement.

XXII.

That by reason of the negligence on the part of the said defendant for failure to make said assessment and the collection of the same from the property abutting upon that portion of the street so improved, and by reason of the failure of the defendant to carry out the provisions of said contract and by reason of the facts heretofore set forth herein, the plaintiff

has been damaged in the amount represented by the said warrant as being due thereon as hereinafter stated.

XXIII.

That on or about the first day of June, 1897, the said plaintiff presented to the City Council of the City of Port Townsend his demand in writing duly verified against the said defendant for the sum of \$1477.50, upon the said warrant, and for damages on account of the aforesaid negligence of the defendant, and that sixty days have elapsed since the said presentation, and that the said City Council has since said presentation rejected the said claim so as aforesaid presented to the defendant, and that there is now due and owing to the plaintiff the sum of \$1477.50, with interest thereon from the 20th day of May, 1897, at the rate of ten per cent. per annum.

XXIV.

That at all times herein mentioned and referred to that portion of Washington Street improved as aforesaid and included within the special assessment district as laid off by the said defendant has been and now is within the territorial limits of the said defendant, and that at all times since the completion of the said improvement the said defendant has constantly used the said street so improved, and has received full benefit of the said improvement.

Wherefore, plaintiff demands judgment against the said defendant for the sum of \$1477.50, together with interest thereon at the rate of ten per cent. per annum from the 20th day of May, 1897, and for plaintiff's costs and disbursements herein to be taxed.

PRESTON, CARR & GILMAN and
R. W. JENNINGS,

Attorneys for Plaintiff.

State of Washington,
County of Jefferson.—ss.

R. W. Jennings being first duly sworn on his oath deposes and says: That he is one of the attorneys for the plaintiff in

the above entitled action; that he has heard the foregoing complaint read, knows the contents thereof, and believes the same to be true; that he makes this affidavit for and on behalf of said plaintiff because plaintiff is a non-resident of the State of Washington, and is not now within said Jefferson County.

R. W. JENNINGS.

Subscribed and sworn to before me this 12th day of August, 1897.

(Seal)

N. S. SNYDER,

Notary Public in and for the State of Washington,
residing at P. T., in said state.

3.

That the said judgment so rendered was and is void because based on a street grade warrant as shown by said complaint which said street grade could under no circumstances form the basis of a claim against the city; that the warrant described in plaintiff's complaint issued in satisfaction of the said judgment is likewise void and for the further reason that such warrant was ordered by the city council at a special meeting of said city council and not at a regular meeting thereof as required by law.

As a Second Affirmative Defense to the said Action Defendants allege as follows:

1.

Defendants repeat and make part of this affirmative defense each and every allegation contained in paragraph one (1) of their first affirmative defense herein.

2.

That the said plaintiff did not commence his said action within the time required by law; that the said warrant described in plaintiff's complaint was issued on February 18, 1898, by order of the city council made on February 17, 1898; that in January, 1899, the said City of Port Townsend de-

clared the said warrant illegal and invalid and refused to take any steps whatever to provide a fund for the payment of the same and refused to pay the same; that such action of said city was made a public record and spread upon the minutes of its Common Council; that plaintiff and plaintiff's assignor well knew or by the exercise of reasonable diligence should have known of such action for more than six years immediately preceding the commencement of this action; and that neither plaintiff nor his assignor brought any action on the said warrant nor did either take any legal steps or commence any legal proceedings whatever for the purpose of enforcing payment on the said warrant or compelling the said city to provide a fund for the payment of the same until the present action was commenced.

As a Third Affirmative Defense to the said action defendants allege as follows:

1.

They repeat and make part of this affirmative defense each and every allegation contained in paragraphs one (1) and two (2) of the first affirmative defense herein.

2.

That at the time said judgment was so rendered and before the issuance of the warrant described in plaintiff's complaint and before the same was ordered to issue by the city council, there were outstanding about \$130,000.00 of street grade warrants issued on special funds of local improvement districts in said city of Port Townsend; that the said city of Port Townsend duly appealed from the judgment rendered against it in said cause of Alonzo Elliott vs. The City of Port Townsend, No. 1784, but before the record in said cause was sent to the Supreme Court for review, and long before the time expired within which said cause could be reviewed by said court, the city council of said city of Port Townsend entered into an agreement with the holders of all of said street grade warrants, including the holder of the warrant reduced to judg-

ment in said cause No. 1784, agreeing that the said city would not defend actions brought on street grade warrants nor appeal from judgments rendered on such warrants nor in any wise resist payment of such judgments, but would satisfy all of such judgments so acquired and rendered, including the judgment rendered in said cause No. 1784, by issuing warrants bearing six per cent. interest on the indebtedness fund of said city in satisfaction of such judgments; that long before the city council of said city entered into said agreement with said street grade warrant holders, the Supreme Court of the State of Washington had decided that under no circumstances can a city be held liable on a street grade warrant; that notwithstanding said decision the city council of said city entered into said agreement, and in furtherance of said agreement and in compliance therewith, the said city council abandoned the said appeal from the judgment in said cause No. 1784, Alonzo Elliott vs. The City of Port Townsend, and voluntarily ordered the issuance of the warrant described in plaintiff's complaint in satisfaction of said judgment; that under the said agreement and in pursuance thereof about \$100,000.00 of street grade warrants were reduced to judgment against the said city without any defense on the part of said city, and indebtedness fund warrants bearing six per cent. interest issued in satisfaction of such judgments; that after said amount of such grade warrants had been so reduced to judgment and indebtedness fund warrants issued in satisfaction thereof, and while there were still outstanding about \$30,000.00 of such street grade warrants not reduced to judgment, and on or about January 3, 1899, the said city council of said city repudiated and abandoned the said agreement and refused to allow any more judgments taken against the city on street grade warrants, and refused to recognize as valid any of the "Indebtedness Fund" warrants issued in pursuance of said agreement and in satisfaction of such judgments, interest and costs, against said city, and said city council of said city has ever since refused and does now refuse to recognize any of said indebtedness fund warrants

as valid obligations against said city, and still refuses to allow any more judgments taken against said city on street grade warrants.

3.

That at the time said agreement was made and at the times said indebtedness fund warrants were so issued and ordered paid by the City Council, the said City of Port Townsend was indebted beyond its constitutional limit of indebtedness for other purposes; that the total assessed valuation of all taxable property in said city according to the assessments for city purposes was \$1,541,426 for the year 1897 and \$1,532,056 for the year 1898; that the total amount of the indebtedness of said city at all times during said year 1898 was before the issuance of any of the said indebtedness fund warrants, as aforesaid, and at the time of the making of the said agreement, over the sum of \$200,000.00, exclusive of all of the said indebtedness fund warrants issued, all of said remaining street grade warrants issued, and exclusive of any indebtedness for supplying said city with water, artificial light or sewers; that the said city did not own or control any works for supplying such water, light or sewers before the year 1905; and that the total assets of said city, including the full amount of all uncollected taxes, penalties and interest due said city and moneys due from all other sources, did not at any time during said year 1898, exceed the total sum of \$100,000.00.

4.

That at no time has the assent of three-fifths of the voters of said city voting at any election been had, in any manner whatever, for the purpose of incurring any part of the said \$130,000.00 street grade indebtedness or any part of the said indebtedness fund warrant issue, nor has any part of said street grade indebtedness of \$130,000.00 or any part of the said indebtedness fund warrant issue of \$100,000.00, ever been in any manner authorized or validated by any of the voters or electors of said city.

Wherefore said defendants pray that they may go hence without day and that they may recover their costs and disbursements herein.

U. D. GNAGEY,
Attorney for said Defendants.

State of Washington,
County of Jefferson—ss.

C. L. Intermela being first duly sworn on oath deposes and says that he is one of the defendants mentioned in the foregoing answer and makes this verification for and in behalf of all of said defendants; that he has heard the said answer read, knows the contents thereof and believes the same to be true.

C. L. INTERMELA,

Subscribed and sworn to before me this 14th day of February, A. D. 1911.

(Seal)

U. D. GNAGEY,
Notary Public in and for the State of Washington,
residing at Port Townsend, Wash.

Indorsed: Answer. Filed U. S. Circuit Court, Western District of Washington, Feb. 15, 1911. Sam'l D. Bridges, Clerk.
W. D. Covington, Deputy.

*In the Circuit Court of the United States for the Western
District of Washington. Northern Division.*

DAVID PERKINS,

Plaintiff,

vs.

CHARLES L. INTERMELA and THE
AMERICAN SURETY COMPANY, a
corporation of the State of New York,
Defendants.

No. 1931.

Comes now the above named plaintiff, by J. A. Bentley, his attorney, and replies to the respective affirmative defenses set up in the answer of the defendants as follows, viz:

REPLY TO THE FIRST AFFIRMATIVE DEFENSE.

The plaintiff, replying to the first affirmative defense, denies that the warrant issued by the City of Port Townsend to Alonzo Elliott described in the complaint is void for the reason alleged in said defense, nor for any reason; and denies that said warrant was ordered by the City Council of said city at a special meeting of said City Council; and denies that the judgment in the case of Alonzo Elliott against the City of Port Townsend in the Superior Court of Washington for the County of Jefferson, numbered 1784, was rendered on November 16, 1897, as alleged in said first defense, but the plaintiff avers that said judgment was rendered on the 14th day of November, 1897.

The plaintiff, further replying to said first defense, avers that a summons was duly issued in said action of Alonzo Elliott, plaintiff, against The City of Port Townsend, defendant, in the Superior Court of Washington for the County of Jefferson; that said summons was duly served upon the defendant, The City of Port Townsend, on or about the 19th day of August, 1897 by delivering a copy thereof, together with a copy of the

complaint in said action to the Mayor of said City; that thereafter and on or about the 7th day of September, 1897, the said City of Port Townsend duly appeared in said action and filed a demurrer to the complaint therein, substantially in the words, to-wit:

*"In the Sup. Court of the State of Washington, for the
County of Jefferson.*

ALONZO ELLIOTT,

vs.

Plaintiff,

THE CITY OF PORT TOWNSEND,

Defendant.

DEMURRER

Now comes the defendant in the above entitled action and demurs to the complaint of the plaintiff therein for that said complaint does not state facts sufficient to constitute a cause of action.

S. A. PLUMLEY,
Attorney for Defendant,
Port Townsend, Washington."

The plaintiff further avers that thereafter, and on or about the sixth day of November, 1897, the said action was duly tried by said Superior Court for the County of Jefferson, on the issue of said demurrer, and the following order thereupon made by the Judge of said Court, to-wit:

*"In the Superior Court of the State of Washington, for the
County of Jefferson.*

ALONZO ELLIOTT,

Plaintiff,

vs.

THE CITY OF PORT TOWNSEND,

Defendant.

This cause coming on to be heard this 6th day of November, 1897, plaintiff appeared by his attorneys, Preston, Carr & Gilman and R. W. Jennings, and defendant by its duly elected, qualified and acting City Attorney, S. A. Plumley, Esq. After argument the Court orders that said demurrer be and the same is hereby overruled. Defendant excepts. Defendant by its attorney announces in open court its determination to stand upon its said demurrer and not to file any answer or further pleading herein.

Dated Nov. 6, 1897.

JAS. G. McCLINTON, Judge."

The plaintiff further avers that thereafter and on or about the 14th day of November, 1897, final judgment in said action was duly rendered by said Court in form and substance substantially as follows, to-wit:

*"In the Superior Court of the State of Washington, for Jefferson
County.*

ALONZO ELLIOTT,

Plaintiff,

vs.

THE CITY OF PORT TOWNSEND, a
municipal corporation,

Defendant.

No. 1784.

JUDGMENT.

Be it remembered, that this cause came on duly and regularly for hearing on the 7th day of November, A. D. 1897, upon the demurrer of the above named defendant to the complaint of the above named plaintiff, the plaintiff appearing by Robert W. Jennings, one of his attorneys of record, and the defendant appearing by S. A. Plumley, its attorney of record, and after argument of counsel for the respective parties the said cause was submitted to the court for its consideration and determination, and the court being fully advised in the premises, and good cause appearing therefor, overruled the said demurrer; whereupon the attorney for the said defendant announces in open court that the said defendant elects to stand upon the said demurrer and refuses to plead further to said complaint; and the said defendant electing to stand upon the said demurrer and failing and refusing to plead further to said complaint;

Now, therefore, by reason of said premises and the law in such case made and provided, and upon the application of the above named plaintiff, it is hereby ordered, adjudged and decreed, that the said plaintiff, Alonzo Elliott, have and recover from the above named defendant, The City of Port Townsend, the full just sum of \$1523.42 and that the said amount draw interest at the rate of ten per cent. per annum from the date hereof until paid, and the plaintiff's costs and disbursements herein to be taxed.

Done in open court this 14th day of November, 1897, at 9:30 o'clock in the forenoon of said day.

JAMES G. McCLINTON, Judge."

REPLY TO THE SECOND AFFIRMATIVE DEFENSE.

The plaintiff, replying to the second affirmative defense, denies that this action was not commenced within the time required by law; denies that in the month of January, 1899, or at any time more than six years before the commencement of this action the City of Port Townsend declared illegal, or invalid

the warrant of the said City of Port Townsend dated February 18, 1898, drawn in favor of Alonzo Elliott, described in the complaint, or refused to take steps to provide a fund for the payment thereof; and denies that such action, or proceeding of said city was made a public record, or was spread upon the minutes of the Common Council, or City Council of said city, more than six years before the commencement of this action; denies that the plaintiff, or plaintiff's assignor knew, or by the exercise of reasonable diligence should or might have known for six years immediately preceding the commencement of this action that the said City of Port Townsend had declared the aforesaid warrant illegal, or invalid, and refused to take steps to provide a fund for the payment thereof, or refused to pay the same—except, that on or about the 19th day of February, 1898, the treasurer of said city refused to pay the said warrant for want of funds, as is alleged in the complaint.

REPLY TO THE THIRD AFFIRMATIVE DEFENSE.

The plaintiff, replying to the third affirmative defense, denies that the said City of Port Townsend duly appealed from the judgment rendered against it in the said cause of Alonzo Elliott vs. The City of Port Townsend; but avers that no notice of appeal from said judgment was given in open court at the time it was rendered, and no notice of appeal from said judgment in writing was served upon the said Alonzo Elliott, nor upon his attorneys, nor upon either of them within ninety days after the rendition of said judgment, nor was any appeal bond ever filed by the said city, nor was the sum of two hundred dollars in lieu of such bond ever deposited with the Clerk of the Superior Court for the County of Jefferson, by which Court said judgment was rendered.

The plaintiff, further replying to said third defense, denies that the City Council of said City of Port Townsend, or the City of Port Townsend at any time entered into an agreement with the said Alonzo Elliott, the plaintiff in the action in which said judgment was rendered, that the said City of Port Town-

send would not defend his said action and would not appeal from a judgment to be rendered therein, nor resist payment of such judgment, but would satisfy such judgment by issuing warrants bearing six per cent. interest on the indebtedness fund of said City in satisfaction of such judgment; and denies that in furtherance of such agreement, or in compliance therewith the said City Council, or the said City of Port Townsend, abandoned its appeal from the judgment which had been rendered against said City in favor of said Elliott referred to in said third defense; and denies that the City Council, or the City of Port Townsend, voluntarily ordered the issuance of the warrant described in the complaint in satisfaction of said judgment, but avers that said City Council and the said City of Port Townsend ordered the issuance of said warrant, and issued the same, in pursuance of mandatory provisions of the statutes of the State of Washington and in accordance with an agreement on the part of the said Elliott made after the rendition of said judgment to accept in satisfaction of said judgment a warrant drawing six per cent. interest per annum instead of the greater rate of eight per cent. interest per annum, to which he would have been entitled except for his acceptance of the warrant drawing six per cent. interest per annum.

J. A. BENTLEY,
Attorney for Plaintiff.

State of Washington,
County of King—ss.

J. A. Bentley, first being duly sworn, deposes and says that he is the attorney for the plaintiff in the foregoing reply described; that the reason for affiant making this verification is that said plaintiff is not within the County of King, but in the State of Massachusetts his place of residence; and affiant says that he verily believes that the statements made in the foregoing reply are true.

J. A. BENTLEY.

Subscribed and sworn to before the undersigned this 9th day of March, 1911.

(Seal)

R. S. BLOSS,

Notary Public in and for the State of Washington,
residing at Seattle.

Indorsed: Reply. Filed U. S. Circuit Court, Western District of Washington, Mar. 9, 1911. Sam'l D. Bridges, Clerk. W. D. Covington, Deputy.

In the Circuit Court of the United States for the Western District of Washington. Northern Division.

DAVID PERKINS,

Plaintiff,

vs.

CHARLES L. INTERMELA and THE
AMERICAN SURETY COMPANY, a
corporation of the State of New York,

Defendants.

No. 1931.

It is hereby stipulated and agreed by the respective parties to the above entitled action to waive a trial of said cause by a jury, and that the same shall be tried by the court without a jury.

Dated April 22d, 1911.

J. A. BENTLEY,

Attorney for Plaintiff.

U. D. GNAGEY,

Attorney for the Defendants.

Indorsed: Waiver of Jury. Filed U. S. Circuit Court, Western District of Washington, Apr. 24, 1911. Sam'l D. Bridges, Clerk. W. D. Covington, Deputy.

In the Circuit Court of the United States for the Western District of Washington. Northern Division.

DAVID PERKINS,

Plaintiff,

vs.

CHARLES L. INTERMELA and THE
AMERICAN SURETY COMPANY, a
corporation of the State of New York,
Defendants.

No. 1931.

STIPULATION.

It is hereby stipulated by the attorneys of the respective parties in the above entitled cause, that the printed slips purporting to be copies of the city ordinances, of the City of Port Townsend, pasted in the book kept by the City Clerk of said city marked: "City Ordinances" are true and correct copies of original ordinances of the City of Port Townsend duly passed by the City Council of said city, approved and signed by the Mayor thereof, attested by the City Clerk and duly published in said City of Port Townsend in a newspaper printed within said city, and that said newspaper was duly designated as the official newspaper of said city; and that said printed copies may be offered and received in evidence upon the trial of the above entitled cause with the same effect by either party thereto, in place and in lieu of the original ordinances they respectively represent duly recorded by the City Clerk, the record of their due passage by the City Council, of the City of Port Townsend, approval and signing by the Mayor of said city, attestation by the City Clerk and due publication thereof in the City of Port Townsend.

U. D. GNAGEY.

J. A. BENTLEY,

Attorney for Plaintiff.

Indorsed: Stipulation that printed slips in ordinance book be recd. as evidence. Filed U. S. Circuit Court, Western District of Washington, Aug. 29, 1911. Sam'l D. Bridges, Clerk. B. O. Wright, Deputy.

In the Circuit Court of the United States for the Western District of Washington. Northern Division.

DAVID PERKINS,

Plaintiff,

vs.

CHARLES L. INTERMELA and THE
AMERICAN SURETY COMPANY, a
corporation of the State of New York,
Defendants.

No. 1931.

The motion of plaintiff for a rule requiring the defendant Charles L. Intermela, to produce at the trial of this cause certain writings and documents, coming on to be heard this 7th day of July, 1911, upon special notice, and the defendant not appearing to oppose the same, on motion of J. A. Bentley, attorney for plaintiff, the defendant Charles L. Intermela is hereby ordered and required to have and produce on the trial of this cause on the 12th day of July instant or at such later date as the cause may be tried, the returns or letters signed by the County Treasurer of the County of Jefferson or by his deputy and delivered to the said Charles L. Intermela as Treasurer of the City of Port Townsend, which purport to enclose or accompany money, bank checks or drafts representing money belonging to the said City of Port Townsend, which said County Treasurer had derived from the sale of real estate by said County of Jefferson previously acquired through proceedings pursuant to the Statutes of Washington against such real estate for the non-payment of taxes, dated respectively January 11,

1909, February 6, 1909, March 10, 1909, May 10, 1909, June 11, 1909, July 10, 1909, October, 1909, November 9, 1909, December 11, 1909, January 3, 1910, March 4, 1910, April 8, 1910, May 10, 1910, July 8, 1910, and August, 1910. Also warrant calls by the defendant Charles L. Intermela as Treasurer of the City of Port Townsend, to-wit: Number 23, issued in April, 1908, and number 24 issued in June, 1908.

C. H. HANFORD, Judge.

Indorsed: Order to produce papers on the trial. Filed U. S. Circuit Court, Western District of Washington, July 7, 1911. Sam'l D. Bridges, Clerk. B. O. Wright, Deputy.

*United States Circuit Court Western District of Washington.
Northern Division.*

DAVID PERKINS,

vs.

CHARLES INTERMELA, et al.

Plaintiff,

Defendants.

No. 1931.

Filed Dec. 11, 1911.

MEMORANDUM DECISION ON THE MERITS.

This is an action upon the official bond of the treasurer of the City of Port Townsend to recover the amount of principal and interest due upon a warrant issued by the City in the year 1898 against a special fund in satisfaction of a judgment rendered by the Superior Court of the State of Washington for Jefferson County, against the City, in the month of November, 1897, which he has refused to pay, although money sufficient to make the payment has been received by him to the credit of said special fund.

The jurisdiction of this Court is contested on the ground that the amount in controversy is not sufficient to bring the case within the jurisdictional limit. This contention is on the assumption that the interest cannot be added to the principal sum for which the warrant was issued to make up the jurisdictional amount. This would be true if the warrant alone constituted the cause of action. But the complaint charges a breach of the conditions of the treasurer's official bond as the cause of action, and the right of action against him and his surety did not accrue until money applicable to the payment of the warrant came into his custody, and when the demand for payment was made and refused he became obligated to pay the accrued interest as well as the principal then due on the warrant, the aggregate amount of which exceeds \$2,000. Therefore the Court overrules the defendants' objections to its exercise of jurisdiction.

Upon the defendants' admissions and the uncontradicted evidence the Court finds that the allegations of the complaint have been fully proved and that the plaintiff has established a *prima facie* right to a judgment for the amount sued for, to-wit: \$2735.52, and interest thereon at the rate of 6% per annum from December 1, 1910, and taxable costs.

There remains to be considered the affirmative defenses pleaded in the defendants' answer. The first of these is that the plaintiff's warrant is not a valid debt of the City which the Treasurer is authorized to pay, because it was issued to satisfy a judgment which is alleged to be void. This is a collateral attack upon the final judgment of a court of superior and general jurisdiction. Lack of jurisdiction of the Court which rendered the said judgment is the only ground upon which such an attack can be successful. By the judgment-roll, a certified transcript of which has been introduced in evidence, it appears that the judgment was rendered in an action regularly commenced and prosecuted against the City of Port Townsend, a municipal corporation of the State of Washington, empowered to sue and defend actions; that the said defend-

ant entered its appearance in the action and demurred to the complaint on the ground that the facts stated therein were insufficient to constitute a cause of action, which demurrer was by the Court overruled; the defendant then announced its determination to stand on its demurrer and to not file any answer or further pleading, and thereupon the judgment was rendered against the City of Port Townsend for the sum of \$1523.42, and interest thereon until paid, at the rate of 10% per annum and costs. The City failed to prosecute an appeal or writ of error to have the case reviewed by the Supreme Court of the State, but instead of doing so compromised the case by an agreement with the plaintiff in the action that he should receive a warrant against the indebtedness fund of the City for the amount of his judgment, which warrant should bear interest at the rate of 6% per annum instead of 10% specified in the judgment of the Court. That agreement was fully executed and the warrant for the amount of \$1548.12 was issued in full satisfaction of said judgment, that being the warrant which is the basis of the plaintiff's demand in the present action, he being the assignee and owner thereof. The answer alleges and the defendants contend that said judgment is void for the reason that it appears by the complaint that the action was for the collection of money due upon a warrant issued as payment in part for the performance of a contract for street improvements, the cost of which should be provided for by a local assessment against property especially benefited by the improvement, and that the City was not obligated nor authorized to pay for said improvement except from the fund to be provided by a local assessment. It appears, however, by the complaint that the street improvement warrant was not the sole cause of action: the City was sued for damages for the breach of its contract, in that it failed to levy and collect the local assessment required to pay the contractor for the improvement, and by reason of the lapse of time and changed conditions it had become impossible to do so. Upon the authority of the decisions of the Supreme Court of the State in the cases

of Bank of British Columbia v. Port Townsend, 16 Wash. 450; 47 Pac. Rep. 896; and of the Circuit Court of Appeals for the Ninth Circuit in the case of Denny v. Spokane, 79 Fed Rep. 719, the demurrer was properly overruled. But in support of its contention the defendant relies upon decisions of the Supreme Court of the State rendered subsequently to its decision in the case above cited, holding in effect that the cost of street improvements cannot be paid out of money of the City raised by general taxation, if it has not collected the special improvement fund and diverted the same. Potter v. Whatcom, 25 Wash. 207; Soule v. Ocosta, 49 Wash. 518. The question involved is one of law, and is the identical question raised by the demurrer which the Court overruled. The Court had jurisdiction of the parties and of the subject matter in litigation, the judgment entered upon the demurrer was a final judgment, on the merits and the question therefore is *res judicata*. If the decision was erroneous it might have been reversed by a court having appellate jurisdiction, but the judgment is not void, nor vulnerable to a collateral attack in a court of co-ordinate jurisdiction. 24 Am. & Eng. Enc. of Law (2nd Ed), 709-746-799.

The answer alleges that the plaintiff's warrant is void for the further reason that it was issued pursuant to a resolution of the City Council passed at a special meeting in violation of a law of the State. By the record, however, it appears that **said resolution** was adopted at an adjourned session of a regular meeting, and not at a special or called meeting of the Council. Moreover, if the Council had not passed the resolution its failure to act at a regular meeting could not affect the validity of the warrant, because the City officials could have been compelled by a writ of mandamus to issue a warrant to satisfy the judgment; therefore the act of the Mayor and City Clerk in issuing the warrant was not unauthorized and the warrant is not void.

The plaintiff's reply put in issue the allegations of the answer constituting the second affirmative defense, and the

defendant has abandoned it by failing to offer any evidence to sustain it.

The third affirmative defense is on the ground that the plaintiff's warrant was issued at a time when the existing indebtedness of the City exceeded the limit of debt which the City could legally incur under the provisions of its charter without special authorization by a popular vote, and it was not so specially authorized. The plaintiff's warrant was issued to satisfy a judgment of a court of competent jurisdiction which conclusively established the validity of the City's obligations to pay the plaintiff in that action the amount which he sued for, and by that judgment the City and its officers are estopped. U. S. v. New Orleans, 98 U. S. 395; State ex rel. Ledger Publishing Co. v. Gloyd, 14 Wash. 5, 24 Am. & Eng. Enc. of Law (2nd Ed.), 766-781.

I direct that findings and a judgment for the plaintiff in accordance with this opinion be prepared and submitted for my signature.

C. H. HANFORD,
United States District Judge.

Indorsed: Memorandum Decision on the Merits. Filed U. S. Circuit Court, Western District of Washington, Dec. 11, 1911. James C. Drake, Clerk. B. O. Wright, Deputy.

*In the United States Circuit Court for the Western District of
Washington, Northern Division.*

DAVID PERKINS,

Plaintiff,

vs.

CHARLES L. INTERMELA AND THE
AMERICAN SURETY COMPANY,
a Corporation of the State of New
York,

Defendants.

No. 1931.

FINDINGS OF FACT PROPOSED BY DEFENDANTS.

This cause came regularly on for trial on August 29, 1911, the plaintiff appeared by his attorney, J. A. Bentley, Esq., and the defendants appeared by their attorney, U. D. Gnagey. Witnesses were sworn on behalf of both parties and testified and other evidence introduced, and the court took the same under advisement, and now makes the following Findings of Fact:

1.

That the plaintiff is a citizen of the State of Massachusetts, the defendant Charles L. Intermela, a citizen of the State of Washington, and the defendant The American Surety Company is a corporation of the State of New York.

2.

That the City of Port Townsend is a municipal corporation and a city of the third class in the State of Washington, organized and existing as alleged in the answer of defendants, paragraph one of their first affirmative defense.

3.

That the defendant Charles L. Intermela is the Treasurer of said City of Port Townsend, and has been such ever since the third day of January, 1910, at which time he succeeded himself as treasurer of said city during the full term of that office which commenced on the fifth day of January, 1909; that the American Surety Company was the surety of the said treasurer for the term beginning January 3, 1910, and that the said defendants executed a bond to the City of Port Townsend as alleged in plaintiff's complaint.

4.

That on the 14th day of November, 1897, in the Superior Court of the State of Washington for Jefferson County, in cause No. 1784, wherein Alonzo Elliott was plaintiff and the City of Port Townsend was defendant, a judgment in favor of said plaintiff and against the said defendant for the sum of \$1523.42 and costs of suit, upon a complaint a true copy of which is set forth in paragraph two of the first affirmative defense of defendant's answer, was signed by the court and the said judgment was filed with the clerk of the said court on November 16, 1897, and was duly recorded on said day; that a summons and complaint was duly served upon the defendant city in said cause, and the said city appeared by its attorney and demurred to the complaint on the ground that the same does not state sufficient facts to constitute a cause of action; that the said demurrer was overruled by the court and the following is a true copy of the said judgment so rendered in said cause, to-wit:

"In the Superior Court of the State of Washington for Jefferson County.

ALONZO ELLIOTT,

Plaintiff,

vs.

THE CITY OF PORT TOWNSEND, a

Municipal Corporation,

Defendant.

No. 1784.

JUDGMENT.

Be it remembered, that this cause came on duly and regularly for hearing on the 7th day of November, A. D. 1897, upon the demurrer of the above named defendant to the complaint of the above-named plaintiff, the plaintiff appearing by Robert W. Jennings, one of his attorneys of record, and the defendant appearing by S. A. Plumley, its attorney of record, and after argument of counsel for the respective parties the said cause was submitted to the court for its consideration and determination, and the court being fully advised in the premises, and good cause appearing therefor, overruled the said demurrer; whereupon the attorneys for the said defendant announces in open court that the said defendant elects to stand upon the said demurrer and refuses to plead further to said complaint, and the said defendant electing to stand upon the said demurrer and failing and refusing to plead further to said complaint:

Now, therefore, by reason of said premises and the law in such cases made and provided, and upon the application of the above named plaintiff, Alonzo Elliott, it is hereby ordered, adjudged and decreed that the said plaintiff, Alonzo Elliott, have and recover from the above named defendant, the City of Port Townsend, the full just sum of \$1523.42, and that the said amount draw interest at the rate of 10% per annum from the

date hereof until paid, and the plaintiff's costs and disbursements herein to be taxed.

Done in open court this 14th day of November, 1897, at 9:30 o'clock in the forenoon of said day.

JAMES G. McCLINTON, Judge."

5.

That on February 14, 1898, the defendant duly appealed from the said judgment to the Supreme Court of the State of Washington by duly serving a notice of appeal and filing the same with the clerk of said Superior Court, together with proof of service, all as required by law.

6.

That at that time and at all the times herein mentioned Ordinance No. 585 of the said city was in force, which said ordinance provided that the regular meetings of the city council of said city shall be held on the first and third Tuesdays of each month.

7.

That on February 15, 1898, that being the third Tuesday in said month, the said city council held a regular meeting, and then took a recess till February 16, 1898, at three o'clock P. M., without stating for what purpose said recess was taken.

8.

That on the following day, February 16, 1898, the said city council met at three o'clock P. M., after the expiration of said recess, and after passing a resolution with reference to certain judgments that had been recently obtained against the city on street grade warrants, took a further recess till four o'clock P. M. of the following day; and at four o'clock P. M. of the following day, that is, on February 17, 1898, the said city council again met and ordered the issuing of the warrant sued on herein.

9.

That on February 18, 1896, in pursuance of said order, the warrant sued on herein and set out in full in plaintiff's complaint, on page four thereof, was issued, and afterwards, on the 19th day of February, 1898, was presented to the city treasurer for payment, and endorsed by said treasurer, all as alleged in said complaint.

10.

That afterwards the said Alonzo Elliott endorsed and transferred the said warrant to the plaintiff, who is now the owner and holder thereof, and was such owner and holder on December 1, 1910.

10.

That at the time the said judgment was so rendered in cause No. 1784, and before the issuance of the said warrant, and before the same was ordered to issue by the city council, there were outstanding about \$130,000 of street grade warrants issued on special funds of local improvement districts in said City of Port Townsend; that the said City of Port Townsend duly appealed from the judgment rendered against it in said cause of Alonzo Elliott vs. the City of Port Townsend, cause No. 1784, but before the record in said cause was sent to the Supreme Court for review, and long before the time expired within which said cause could be reviewed by said court, the said City Council of the City of Port Townsend entered into an agreement with the holders of all of said street grade warrants, including the holder of the warrant reduced to judgment in said cause No. 1784, agreeing that the said city would not defend actions brought on street grade warrants nor appeal from judgments rendered on such warrants, nor in any wise resist payment of such judgments, but would satisfy all of such judgments so acquired and rendered, including the judgment rendered in said cause No. 1784, by issuing warrants bearing six per cent. interest on the indebtedness fund of said city in satisfaction of such judgments; that long before the city council of

said city entered into said agreement with said street grade warrant holders, and long before the rendition of the said judgment in cause No. 1784 aforesaid, the Supreme Court of the State of Washington had decided that under no circumstances can a city be held liable on a street grade warrant issued on a special fund; that notwithstanding said decision, the city council of said city entered into said agreement, and in furtherance of said agreement and in compliance therewith, the said city council abandoned the said appeal from the judgment in said cause No. 1784, and voluntarily ordered the issuance of the warrant described in plaintiff's complaint in satisfaction of said judgment; that under the said agreement and in pursuance thereof, about \$100,000 of street grade warrants were reduced to judgment against the said city without proper defense on the part of said city, and indebtedness fund warrants bearing six per cent. interest issued in satisfaction of such judgments; that after said amount of such street grade warrants had been so reduced to judgment and indebtedness fund warrants issued in satisfaction thereof, and while there were still outstanding about \$30,000 of such street grade warrants not reduced to judgment, and on or about January 3, 1899, the said city council of said city repudiated and abandoned the said agreement and refused to allow any more judgments taken against the city on such street grade warrants, and refused to recognize as valid any of the indebtedness fund warrants issued in pursuance of said agreement and in satisfaction of such judgments, interest and costs, against said city, and the city council of said city has ever since refused and does now refuse to recognize any of said indebtedness fund warrants as valid obligations against said city, and still refuses to allow any more judgments taken against said city on such street grade warrants.

11.

That at the time said agreement was so made and at the time the said indebtedness fund warrants were so issued and ordered paid by the city council, the said City of Port Townsend

was indebted beyond its constitutional limit of indebtedness for other purposes; that the total assessed valuation of all taxable property in said city according to the assessment for city purposes was \$1,541,426 for the year 1897 and \$1,532,056 for the year 1898; that the total amount of the indebtedness of said city at all times during said year 1898 was before the issuance of any of the said indebtedness fund warrants, as aforesaid, and at the time of making the said agreement, over the sum of \$200,000 exclusive of all of the said indebtedness fund warrants issued all of said remaining street grade warrants, and exclusive of any indebtedness for supplying said city with water, artificial light or sewers; that the said city did not own or control any works for supplying such water, light or sewers before the year 1905; and that the total assets of said city, including the full amount of uncollected taxes, penalties and interest due said city and moneys due from all sources, did not at any time during said year 1898 exceed the total sum of \$100,000.

12.

That at no time has the assent of three-fifths of the voters of said city voting at any election been had, in any manner whatever, for the purpose of incurring any part of the said \$130,000 street grade warrant indebtedness, or any part of the said indebtedness fund warrant issue, nor has any part of said street grade warrant indebtedness of \$130,000, or any part of said indebtedness fund warrant issue of \$100,000, ever been in any manner authorized or validated by any of the voters or electors of said city.

13.

That ever since the thirteenth day of September, 1906, city ordinance No. 722, entitled "An Ordinance to define the duties of the City Treasurer of the City of Port Townsend," has been and now is in force, and section nine of said ordinance reads as follows, to-wit "It shall be the duty of the city treasurer to turn into the 'indebtedness fund' all moneys derived by the

city from the County of Jefferson for its share of the proceeds of the sale of any county property, and all moneys from city taxes, penalty and interest, excepting moneys collected for the payment of any city bonds, and excepting the tax levies for the three preceding years, which he shall segregate, immediately upon receipt, into the respective funds of the city, according to the respective levies therefor, until all the legal outstanding claims against the 'indebtedness fund' of the city shall have been paid, but the city treasurer shall pay no 'indebtedness fund' warrant, excepting the 'general expense,' 'fire and water,' 'light' and 'road' fund warrants without the special order of the city council"; that the warrant involved in this suit is one of those warrants which the city treasurer by this ordinance is directed not to pay without a special order of the said city council, and that the said city council never made any order directing the said city treasurer to pay such warrant.

14.

That all of the warrants, certificates and other obligations and indebtedness of said City of Port Townsend which have or had preference over the plaintiff's said warrant for payment out of money in the city treasury of said city belonging to the indebtedness fund of said city were called in for payment or had been paid by the treasurer of said city prior to the fourth day of January, 1910, and the plaintiff's said warrant stands next in order of number and date after the warrants, certificates and other obligations and indebtedness of said city so as aforesaid called in or paid.

15.

That between the fourth day of January, 1910, and the first day of December, 1910, both inclusive, the said city treasurer received as the city's share of the proceeds of the sale of county property the sum of \$4674.69, and that on said first day of December, 1910, the said plaintiff presented his said warrant to the treasurer of said city for payment, and such payment was refused by said treasurer.

16.

That the said city council, in ordering the issuance of the said warrant No. 2 on the indebtedness fund of said city, and the mayor and clerk, in issuing the sum in satisfaction of said judgment in cause No. 1784, acted fraudulently, and the said warrant is fraudulent and void, and was issued without authority of law.

U. D. GNAGEY,
Attorney for Defendant.

Copy of the foregoing proposed findings received and due service thereof accepted this 15th day of December, 1911.

J. A. BENTLEY,
Attorney for Plaintiff.

Indorsed: Findings of Fact Proposed by Defendants. Filed U. S. Circuit Court, Western District of Washington, Dec. 15, 1911. James C. Drake, Clerk. B. O. Wright, Deputy.

*In the District Court of the United States for the Western
District of Washington, Northern Division.*

DAVID PERKINS,

Plaintiff,

vs.

CHARLES L. INTERMELA *et al.*,

Defendants.

No. 1931.

This cause came regularly on for trial by the court, a trial by jury having been waived, on August 29, 1911, the plaintiff appearing by his attorney, J. A. Bentley, and the defendants by their attorney, U. D. Gnagey. Witnesses were sworn and testified on behalf of both the parties, and other evidence in-

troduced. The court took the case under advisement, and the decision thereof having been rendered and entered by the clerk, the court makes special findings of fact as follows:

First: That the plaintiff is a citizen of the State of Massachusetts, the defendant Charles L. Intermela a citizen of the State of Washington, and the defendant The American Surety Company is a corporation of the State of New York, and the matter in dispute in the action, exclusive of interest and costs, exceeds the sum of two thousand dollars.

Second: That the City of Port Townsend is a municipal corporation, a city of the third class, having less than twenty thousand inhabitants, in the County of Jefferson, State of Washington, and the defendant Charles L. Intermela was Treasurer of said City for the term which commenced on January 4, 1910, at that time succeeding himself as Treasurer of said City for the term which commenced on January 5, 1909; and that the defendants executed to the City of Port Townsend for the 1910 term the bond set out in the complaint.

Third: That on the 19th day of August, 1897, the City of Port Townsend was served with a summons and a copy of the complaint in an action for damages for breach of contract in the Superior Court for Jefferson County, State of Washington, in which Alonzo Elliott was plaintiff and the City of Port Townsend was defendant; that said city appeared in said action and demurred to the complaint upon the ground that it did not state facts sufficient to constitute a cause of action; that upon the hearing the court overruled the demurrer and then and there it was announced in open court by the defendant's attorney that the defendant would stand upon its demurrer and would not answer or further plead to the complaint, and thereafter, on the 14th day of November, 1897, judgment for the plaintiff Alonzo Elliott and against the defendant the City of Port Townsend for the sum of \$1523.42, and that said amount draw interest at the rate of ten per cent. per annum from that date until paid, besides the costs and disbursements of plaintiff to be taxed, was signed by the judge,

which judgment was filed and entered by the clerk on the 16th day of November, 1887; that on February 14, 1898, the defendant city served the plaintiff Alonzo Elliott with a notice of appeal from said judgment to the Supreme Court of Washington and filed the same with the clerk of the Superior Court, where said judgment was entered, but no further prosecuted said appeal.

Fourth: That a regular meeting of the city council of the City of Port Townsend convened on February 15, 1898, and continued its sessions upon the two succeeding days; that at said meeting the city council agreed with Alonzo Elliott, the plaintiff in whose favor said judgment was rendered, that he should receive a warrant against the indebtedness fund of the city for the amount of his judgment, which warrant should bear interest at the rate of 6% per annum, instead of 10% specified in the judgment of the court; that the warrant set out in the complaint for \$1548.12 was issued pursuant to said agreement in full satisfaction of said judgment; and on the 19th day of February, 1898, was presented to the Treasurer of the City of Port Townsend for payment by said Alonzo Elliott and payment thereof refused for want of funds and so endorsed upon the back by said treasurer, and thereafter the said Elliott endorsed and transferred said warrant to the plaintiff.

Fifth: That on December 1, 1910, interest to the amount of \$1187.40 had accrued on plaintiff's warrant; that the defendant Intermela had in his hands as Treasurer of the City of Port Townsend on that date more than sufficient money which was applicable to the payment of said warrant to fully pay the same, both principal and interest; that on that day plaintiff presented said warrant to said Intermela at his office and demanded payment thereof, and he refused to pay the same.

C. H. HANFORD, Judge.

Indorsed: Special Findings. Filed in the U. S. District Court, Western Dist. of Washington, Feb. 15, 1912. A. W. Engle, Clerk, by S., Deputy.

*In the District Court of the United States for the Western
District of Washington, Northern Division.*

DAVID PERKINS,

Plaintiff,

VS.

CHARLES L. INTERMELA AND THE

AMERICAN SURETY COMPANY, a

corporation of the State of New York,

Defendants.

No. 1931.

JUDGMENT.

This cause came regularly on for trial by the court without a jury, a trial by jury having been waived by the parties, and was tried on the 29th and 30th days of August, 1911, and taken under advisement, and on the 11th day of December, 1911, the court filed its decision in favor of the plaintiff, that the defendants were jointly and severally indebted to the plaintiff in the sum of twenty-seven hundred and thirty-five dollars and fifty-two cents and interest thereon at the rate of six per cent. per annum from December 1, 1910, and on the 15th day of February, 1912, the said court having made its special findings in said cause, which were filed with the clerk on February 15, 1912;

Now, therefore, it is hereby adjudged that the plaintiff, David Perkins, do recover of and from the defendants, Charles L. Intermela and The American Surety Company, or either of them, the full sum of twenty-nine hundred thirty-three dollars and eighty-four cents, together with his costs and disbursements in this action to be taxed, and that the plaintiff have execution therefor.

Done in open court this 15th day of February, 1912.

C. H. HANFORD, Judge.

Indorsed: Judgment. Filed in the U. S. District Court, Western Dist. of Washington, Feb. 15, 1912. A. W. Engle, Clerk, by S., Deputy.

*In the District Court of the United States for the Western
District of Washington, Northern Division.*

DAVID PERKINS,

Plaintiff,

vs.

CHARLES L. INTERMELA *et al.*,

Defendants.

No. 1931.

EXCEPTION TO ENTRY OF FINDINGS AND JUDG- MENT.

The findings and judgment herein having been entered in the absence of the defendants and their counsel, U. D. Gnagey, and without notice, on the 15th day of February, A. D. 1912, and there being attached to said findings and judgment no formal allowance of exception thereto of said defendants, said defendants now in writing hereby except to said findings and judgment and to each and every part thereof.

U. D. GNAGEY,

Attorney for Said Defendants.

The foregoing exception is hereby allowed this February 27, 1912.

C. H. HANFORD, Judge.

Service of the within exception to entry of findings by delivery of a copy to the undersigned is hereby acknowledged this 26th day of February, 1912.

W. M. WATSON,

Attorney for Defendant.

Indorsed: Exceptions to Entry of Judgment and Findings.
Filed in the U. S. District Court, Western Dist. of Washington,
Feb. 29, 1912. A. W. Engle, Clerk, by S., Deputy.

*In the United States District Court for the Western District of
Washington, Northern Division.*

DAVID PERKINS,

Plaintiff,

vs.

CHARLES L. INTERMELA AND THE
AMERICAN SURETY COMPANY, a
corporation,

Defendants.

MOTION TO REVERSE FINDINGS OF FACT.

Come now the defendants herein, by their attorney, U. D. Gnagey, and respectfully request the court to revise its findings herein signed on the 15th day of February, 1912, so as to make the said findings cover all the issues in the cause and to eliminate from the said findings conclusions of law.

This motion will be based on the record in this cause and on the stenographer's notes taken at the trial and on defendants' proposed findings.

U. D. GNAGEY,
Attorney for Defendants.

Indorsed: Motion to Revise Findings of Fact. Filed Feb. 23, 1912. A. W. Engle, Clerk, by F. A. Simpkins, Deputy.

In the District Court of the United States for the Western District of Washington, Northern Division.

DAVID PERKINS,

Plaintiff,

vs.

CHARLES L. INTERMELA *et al.*,

Defendants.

No. 1931.

This cause coming on for hearing this 26th day of February, A. D. 1912, upon the motion of defendants herein, by their counsel, U. D. Gnagey, to revise the findings of fact heretofore entered herein on the 15th day of February, A. D. 1912, and to make the special findings of fact heretofore duly requested by said defendants, and said matter being duly presented to the court,

The court here and now refuses all the special findings of fact submitted by defendants, to which refusal of the court defendants except, and their exceptions are hereby allowed.

At the request of the defendants the court modifies the fifth finding of fact heretofore made by the court, so that said fifth finding of fact shall read as follows, to-wit:

That all of the warrants, certificates and other obligations and indebtedness of said City of Port Townsend, which have or had preference over the plaintiff's said warrant for payment out of money in the hands of the city treasurer and said city belonging to the indebtedness fund of said city were called in for payment or had been paid by the treasurer of said city prior to the 4th day of January, 1910, and plaintiff's said warrant stands next in order of number and date after the warrants, certificates and other obligations and indebtedness of said city so, as aforesaid, called in or paid, and that between the 4th day of January, 1910, and the 1st day of December, 1910, both

inclusive, said city treasurer received as the city's share of the proceeds of the sale of property that had been forfeited to the county for non-payment of taxes the sum of \$4674.69, and that on said 1st day of December, 1910, said plaintiff presented his said warrant to said treasurer of said city for payment, and such payment was refused by said treasurer. When said money was received by him Ordinance No. 722 of the City of Port Townsend, adopted in the year 1906, was an existing ordinance of said city, the ninth section of which reads as follows:

"It shall be the duty of the city treasurer to turn in to the indebtedness fund all moneys received by the city from the County of Jefferson for its share of the proceeds of the sales of any county property, and all moneys from city taxes, penalties and interest, excepting moneys collected for the payment of any city bonds, and excepting the tax levies for the three preceding years, 'which are described,' and turn in to the respective funds of the city, according to the respective levies therefor, until all the legal outstanding claims against the indebtedness fund shall have been paid; but the city treasurer shall not pay any indebtedness fund warrants, except the general expense, fire, water, light and roads fund warrants, without the special order of the city council."

Done in open court this 2nd day of March, A. D. 1912.

C. H. HANFORD,
United States District Judge.

Indorsed: Order. Filed in the U. S. District Court, Western Dist. of Washington, Mar. 4, 1912. A. W. Engle, Clerk, by S., Deputy.

*In the United States District Court for the Western District
of Washington, Northern Division.*

DAVID PERKINS,

Plaintiff,

VS.

CHARLES L. INTERMELA *et al.*,

Defendants.

EXCEPTIONS TO SPECIAL FINDING OF FACTS AND
TO REFUSAL OF COURT TO MAKE
OTHER FINDINGS.

Come now the defendants herein, by their attorney, U. D. Gnagey, and except to the special finding of fact made by the court and to the refusal of the court to make other findings proposed by said defendants, in the following particulars:

First: They except to that portion of the first finding made by the court which states that "the matter in dispute in the action, exclusive of interests and costs, exceeds the sum of two thousand dollars," for the reason that the same is not supported by any evidence in the case and is contrary to the facts shown by the pleadings, which exception is allowed by the court.

Second: Defendants except to that portion of the third finding made by the court, wherein it is found that the action brought by Alonzo Elliott against the City of Port Townsend on the 19th day of August, 1897, was "an action for damages for breach of contract," without specifically stating the nature of the contract, and without making the finding proposed by defendants as to the nature of the suit or action, on the ground that the said finding or portion thereof is not supported by any evidence and is contrary to the admissions of the pleadings in this cause, which exception is allowed by the court.

Third: Defendants except to that portion of the fourth finding made by the court, in which it is found that the regular meeting of the city council held on February 15, 1898, "continued its sessions upon the two succeeding days," for the reason that the said finding is not supported by any evidence in the case, which exception is allowed by the court.

Fourth: Defendants except to the ruling of the court in refusing to find that the City of Port Townsend duly appealed from the judgment in the case of Alonzo Elliott vs. The City of Port Townsend and that such appeal was pending at the time the city council ordered the warrant drawn that is involved in this action, as embodied in their proposed fifth finding, which exception is allowed by the court.

Fifth: Defendants except to the refusal of the court to make the sixth finding proposed by them in regard to the regular meetings of the city council, which exception is allowed by the court.

Sixth: Defendants except to the refusal of the court to make the seventh and eighth findings proposed by them, in regard to the meetings held by said council on the 15th, 16th and 17th of February, 1898, which exception is allowed by the court.

Seventh: Defendants except to the refusal of the court to make the tenth finding proposed by them (second finding marked 10), which exception is allowed by the court.

Eighth: Defendants except to the refusal of the court to make the eleventh finding proposed by them, which exception is allowed by the court.

Ninth: Defendants except to the refusal of the court to make the twelfth finding proposed by them, which exception is allowed by the court.

Tenth: Defendants except to the refusal of the court to make the thirteenth finding proposed by them, which exception is allowed by the court.

Eleventh: Defendants except to the refusal of the court to make the sixteenth finding proposed by them, in regard to the illegality and fraud in the issuance of the warrant involved in this action, which exception is allowed by the court.

All of the exceptions to the rulings of the court to the refusal of the court to make the findings herein referred to are based on the ground that such findings proposed and rejected by the court are shown by the evidence and the pleadings and the stipulations and are material to a proper determination of the said action.

Dated March 11, 1912.

C. H. HANFORD, District Judge.

Indorsed: Exceptions. Filed in the U. S. District Court, Western Dist. of Washington, March 28, 1912. A. W. Engle, Clerk, by S., Deputy.

PLAINTIFF'S EXHIBIT A

Port Townsend, Wash., Feb. 17, 1898.

Upon motion the following resolution was duly passed by the city council:

Whereas, judgment has been duly entered in the Superior Court of the State of Washington for Jefferson County, against the City of Port Townsend, in favor of the following named parties, for the following amounts respectively, to-wit:

Merchants' Bank of Port Townsend.....	\$14,375.28
Manchester Savings Bank.....	7,788.71
Commercial Bank of Port Townsend.....	10,324.44
John Barneson	4,587.33
Bank of British Columbia.....	18,600.15
E. M. Johnson.....	1,812.23
First National Bank of Port Townsend.....	7,625.00
E. Heuschober	482.65
Alonzo Elliott	(about) 1,400.00

Together with costs and interest from date of judgments at 10% per annum.

And whereas, the said parties have duly presented the said claims under said judgments against the city to the city council for settlement and payment;

And whereas, it is the opinion of the said council that said claims are a just and legal obligation against the City of Port Townsend and should be satisfied and paid;

Now, therefore, be it resolved by the city council of the City of Port Townsend that said claims and judgments be, and the same are hereby allowed and ordered paid as claims against the said city, and that warrants be drawn in the usual form in favor of the said respective parties for the respective amounts of the said judgments, costs and interest, on the "indebtedness fund" of said city, which warrants shall be signed by the city

clerk and mayor, and with the city seal attached, and delivered to the said respective parties or their attorneys immediately upon the satisfaction of said judgments of record in the Superior Court aforesaid, that the above warrants shall draw interest at the rate of 6% per c. p. annum from date of same and until paid, and also that this resolution is upon the condition that all of said parties accept the conditions herein named, on or before February 17 at 3 o'clock P. M.

State of Washington,
City of Port Townsend,
Office of City Clerk.—ss.

The undersigned city clerk of the City of Port Townsend hereby certifies that the foregoing annexed typewriting contains a true and correct copy of an original document and the indorsements thereupon on file in my office.

Witness my hand and the official seal of the City of Port Townsend this 19th day of May, 1911.

(Seal)

GEORGE ANDERSON, City Clerk.

Indorsed: Certified Copy of Resolution Exhibit A. Plaintiffs' Exhibit A. Filed U. S. Circuit Court, Western District of Washington, Sept. 20, 1911. Sam'l D. Bridges, Clerk. B. O. Wright, Deputy.

PLAINTIFF'S EXHIBIT B

Port Townsend, Wash., Feb. 17, 1898.

To the Mayor and City Council of the City of Port Townsend.

GENTLEMEN: We, the undersigned judgment creditors of the said City of Port Townsend, hereby agree to accept and do hereby accept the proposition of the said city and its council, made on the 16th day of February, 1898, to satisfy and pay our respective judgments against the said city by issuing warrants for the full amount of said judgments, interest and costs, said warrants to be drawn on the "indebtedness fund" of said city, and to bear interest from the date of their issue at the rate of six (6) per cent. per annum; and hereby agree to cancel said judgments in full of record in the Superior Court of Jefferson County, Washington, upon the receipt of said warrants.

BANK OF BRITISH COLUMBIA, of Victoria ,B. C.
FIRST NATIONAL BANK OF PORT TOWNSEND.
E. M. JOHNSON.
EMIL HEUSCHOB.

By MORRIS B. SACHS,
Attorney of Record in Said Causes for Said Judgment Creditors.

THE MERCHANTS' BANK OF PORT TOWNSEND.
THE COMMERCIAL BANK OF PORT TOWNSEND.
JOHN BARNESON.
MANCHESTER SAVINGS BANK.

By W. W. FELGER,
Attorney of Record in Said Causes for Said Last Four Mentioned Creditors.

ALONZO ELLIOTT.

By PRESTON, CARR, GILMAN, R. W. JENNINGS,
His Attorneys.

State of Washington,
City of Port Townsend,
Office of City Clerk.—ss.

The undersigned city clerk of the City of Port Townsend hereby certifies that the foregoing annexed typewriting contains a true and correct copy of an original document and the endorsements thereupon on file in my office.

Witness my hand and the official seal of the City of Port Townsend this 19th day of May, 1911.

(Seal)

GEORGE ANDERSON, City Clerk.

Endorsed: Certified copy Acceptance of Proposition. Exhibit B. Filed U. S. Circuit Court, Western District of Washington, Sept. 20, 1911. Sam'l D. Bridges, Clerk. B. O. Wright, Deputy.

PLAINTIFF'S EXHIBIT C

Port Townsend, Wash., Feb. 15, 1898.

The city council of the City of Port Townsend met in regular session today at 7:30 P. M. at the council chambers. At the call of the roll there were present: The mayor, the city clerk, the city attorney, the city marshal and all of the seven councilmen.

The minutes of the preceding regular meeting were read and approved * * *

Under the call of new business the clerk read notice of attorneys in the street grade warrant cases * * *

After which, on motion, the council took a recess until 3 o'clock P. M., February 16th, 1898.

Port Townsend, Wash., Feb. 16, 1898.

The city council met at 3 o'clock P. M. today, after expiration of recess, in continuation of yesterday's meeting, and after being called to order, the call of the roll showed present his Honor the Mayor, and presiding officer, the city Clerk, the city attorney, and all of the seven members of the council.

Councilman Hastings moved to pay the judgment holders in street grade warrant cases lately decided 5% p. a. interest on the warrants from date of their issue to date of and 6% p. a. on the warrants to be issued in satisfaction of the judgments. This motion was seconded by Councilman Peterson.

Councilman Tanner proposed to amend by making this payment conditional on acceptance by creditors by tomorrow at 3 o'clock P. M.

At the suggestion of Councilman Oliver, attorney for some of said creditors, W. W. Felger then addressed the council, and stated (in effect) that his clients would not accept that proposition, and that he felt quite certain that those represented by Judge Sachs would not do so, either. He believed, however,

that the latter would accept (and he felt positive his clients would) the proposition to issue warrants bearing 6% interest from date of warrant for the amount of judgment.

Councilman Peterson then moved to amend by making warrants pay 6% p. a. interest, and to be issued for amount of judgment.

This was seconded, put to vote and carried.

Councilman Plummer then moved to amend so as to make this conditional on acceptance by 3 o'clock tomorrow. This was also seconded and carried.

A resolution was then drawn up covering exactly the meaning of above, and on motion of Councilman Oliver, seconded by Councilman Peterson, it was adopted.

On motion council then took further recess until 4 o'clock P. M., February 17th, 1898.

Port Townsend, Wash., Feb. 17, 1898.

The City Council of the City of Port Townsend met at 4 o'clock P. M. today at the council chamber, after expiration of recess, and in continuation of the regular meeting of February 15th, 1898.

At the call of the roll there were present his honor the mayor and presiding officer, the city clerk, and all of the seven members of the council.

The Mayor then asked whether any acceptance by judgment holders of the proposition to satisfy judgments in the street grade warrant cases had been filed. This being answered by the clerk affirmatively, said answer was read by him. It was an unconditional acceptance of said proposition by the said holders, as far as represented by Attorneys W. W. Felger and M. B. Sachs.

After this reading Attorney R. W. Jennings made a statement regarding judgment held by Alonzo Elliott, and represented by him. He stated that his clients had a street grade

warrant older than the above others, and also held a judgment prior in time to theirs, but that he had not been notified of this proposition, but had only learned of it this morning. He was also willing to accept said proposition, and asked that his client's name be included in the resolution by which said proposition had been made. After some discussion Councilman Hastings left, being excused on account of pressing business, and the city attorney came in and took his seat.

The Mayor then asked the city attorney whether he had a contract with the city for remuneration on appeal to Supreme Court in the case represented by Attorney Jennings. The city attorney replied that he had such contract, and replied to a question put later on by Councilman Torjusion that in case the city did not appeal the Jennings case the city would owe him nothing on that score.

Councilman Tanner, seconded by Councilman Plummer, then moved that the Jennings judgment be included in said resolution, which was carried.

Councilman Oliver, seconded by Councilman Peterson, then moved that the clerk be instructed to draw warrants according to the resolution, and in denominations such as the respective attorneys might desire. This was carried, after which the council, on motion, adjourned.

D. H. HILL, Mayor.

AUGUST DUDDENHAUSEN, City Clerk.

State of Washington,
City of Port Townsend,
Office of City Clerk—ss.

The undersigned City Clerk of the City of Port Townsend hereby certifies that the foregoing annexed typewriting contains a true and correct copy of that portion of the record of the proceedings of the City Council of the City of Port Townsend on the fifteenth, sixteenth and seventeenth days of Feb-

ruary, 1898, which relates to street grade warrant cases, judgments therein, and the payment of such judgments.

Witness my hand and the official seal of the City of Port Townsend this——day of May, 1911.

(Seal)

GEORGE ANDERSON, City Clerk.

Endorsed: Certified Copy of Proceedings of City Council. Exhibit C. Filed U. S. Circuit Court, Western District of Washington, Sept. 20, 1911. Sam'l D. Bridges, Clerk. B. O. Wright, Deputy.

PLAINTIFF'S EXHIBIT E

In the Circuit Court of the United States for the Western District of Washington, Northern Division.

DAVID PERKINS,

Plaintiff,

VS.

CHARLES L. INTERMELA AND THE
AMERICAN SURETY COMPANY, a
Corporation of the State of New York,
Defendants.

STIPULATION.

It is hereby stipulated by the attorneys of the respective parties in the above entitled cause that the printed slips purporting to be copies of the city ordinances of the City of Port Townsend, pasted in the book kept by the city clerk of said city, marked "City Ordinances," are true and correct copies of original ordinances of the City of Port Townsend duly passed by the city council of said city, approved and signed by the mayor thereof, attested by the city clerk and duly published in said City of Port Townsend in a newspaper printed within said city, and that said newspaper was duly designated as the official newspaper of said city. And that said printed copies may be offered and received in evidence upon the trial of the above entitled cause with the same effect by either party thereto, in place and in lieu of the original ordinances they respectively represent, duly recorded by the city clerk, the record of their due passage by the city council of the City of Port Townsend, approval and signing by the mayor of said city, attestation by the city clerk and due publication thereof in the City of Port Townsend.

U. D. GNAGEY.

J. A. BENTLEY,

Attorney for Plaintiff.

Indorsed: Pltfs. Ex. E. Stipulation that printed slips in Ordinance Book be recd. as evidence. Filed U. S. Circuit Court, Aug. 29, 1911. Sam'l D. Bridges, Clerk. B. O. Wright, Deputy.

PLAINTIFF'S EXHIBIT H

State of Washington,
County of Jefferson—ss.

N. S. Snyder, being first duly sworn, on oath says: That he is and at all times hereinafter mentioned was a citizen of the United States and of the State of Washington, a resident of the City of Port Townsend in the said state, over the age of 21 years, not interested in but competent to be a witness in the cause mentioned in the annexed summons; that he served the said summons on the defendant the City of Port Townsend, a municipal corporation, in the County of Jefferson, on the 19th day of August, 1897, by then and there delivering to D. H. Hill, as Mayor of said city, a true copy of said summons and therewith a true copy of the complaint in said action.

N. S. SNYDER.

Subscribed and sworn to before me this 19th day of August, 1897.

(L. S.)

W. C. DAWSON,

Notary Public in and for the State of Washington,
residing at Port Townsend.

Fees 80c.

*In the Superior Court of the State of Washington for the
County of Jefferson.*

ALONZO ELLIOTT,

Plaintiff,

vs.

THE CITY OF PORT TOWNSEND, a

Municipal Corporation,

Defendant

No.

SUMMONS.

*The State of Washington to the said The City of Port Townsend,
a Municipal Corporation, Defendant:*

You are hereby summoned to appear within twenty (20) days after service of this Summons upon you, exclusive of the day of service, and defend the above entitled action in the Court aforesaid; and answer the complaint of the plaintiff, and serve a copy of your answer upon the undersigned attorneys for plaintiff at their office below stated; and in case of your failure so to do judgment will be rendered against you according to the demand of the complaint, which will be filed with the Clerk of said Court. (A copy of which is herewith served upon you.)

PRESTON, CARR & GILMAN and
R. W. JENNINGS

Plaintiff's Attorneys.

Postoffice address: 304 Pioneer Block, Seattle, King
County, Washington.

Indorsed: Original No. 1784. In the Supreme Court of Jefferson County, Washington. Alonzo Elliott, plaintiff, vs. The City of Port Townsend. Summons filed this 19th day of August, 1897, J. N. Laubach, Clerk. Preston, Carr & Gilman, attorneys for plaintiff, Rooms 304 Pioneer Block, Corner of First Ave. and James St., Seattle, Wash.

Copy of Complaint omitted. See Item 18, Praeceptum for Transcript.

*In the Superior Court of the State of Washington for the
County of Jefferson.*

ALONZO ELLIOTT,

Plaintiff,

VS.

THE CITY OF PORT TOWNSEND,

Defendant.

DEMURRER.

Now comes the defendant in the above entitled action and demurs to the complaint of the plaintiff therein for that said **complaint does not state facts sufficient to constitute a cause of action.**

S. A. PLUMLEY,
Attorney for Defendant,
Port Townsend, Washington.

Indorsed: 1784. Superior Court, Alonzo Elliott vs. The City of Port Townsend. Demurrer filed Nov. 6, 1897, J. N. Laubach, Clerk. By Robt. Biles, Deputy. S. A. Plumley, Atty. for Deft.

In Sup. Court Jefferson County, Wash.

ALONZO ELLIOTT,

Plaintiff,

vs.

THE CITY OF PORT TOWNSEND,

Defendant.

This cause coming on to be heard this 6th day of November, 1897, plaintiff appeared by his attorneys, Preston, Carr and Gilman and R. W. Jennings, and defendant by its duly elected, qualified and acting City Attorney, S. A. Plumley, Esq. After argument the Court orders that said demurrer be and the same is hereby overruled. Defendant excepts. Defendant by its attorney announces in open Court its determination to stand upon its said and not to file any answer or further pleading herein.

Dated Nov. 6, 1897. JAMES G. McCLINTON, Judge."

Indorsed: 1784. Elliott v. Port Townsend. Order overruling Demurrer. Filed Nov. 6th, 1897. J. N. Laubach, Clerk.

DEFENDANT'S EXHIBIT 1

*In the Superior Court of the State of Washington for
Jefferson County.*

ALONZO ELLIOTT,

Plaintiff,

vs.

THE CITY OF PORT TOWNSEND, a
Municipal Corporation,

Defendant.

No. 1874.

JUDGMENT.

Be it remembered, that this cause came on duly and regularly for hearing on the 7th day of November, A. D. 1897, upon the demurrer of the above named defendant to the complaint of the above named plaintiff, the plaintiff appearing by Robert W. Jennings, one of his attorneys of record, and the defendant appearing by S. A. Plumley, its attorney of record, and after argument of counsel for the respective parties the said cause was submitted to the Court for its consideration and determination, and the court being fully advised in the premises, and good cause appearing therefor, overruled the said demurrer; whereupon the attorney for the said defendant announces in open Court that the said defendant elects to stand upon the said demurrer and refuses to plead further to said complaint; and the said defendant electing to stand upon the said demurrer and failing and refusing to plead further to said complaint:

Now, therefore, by reason of said premises and the law in such case made and provided, and upon the application of the above named plaintiff, it is hereby order, adjudged and decreed, that the said plaintiff Alonzo Elliott, have and recover from the above named defendant, The City of Port Townsend, the full just sum of \$1523.42 and that the said amount draw interest at the rate of ten per cent per annum from the date

hereof until paid, and the plaintiff's costs and disbursements herein to be taxed.

Done in open Court this 14th day of November, 1897, at 9:30 o'clock in the forenoon of said day.

JAMES G. McCLINTON, Judge.

*In the Superior Court of the State of Washington, for the
County of Jefferson.*

ALONZO ELLIOTT,

Plaintiff,

vs.

THE CITY OF PORT TOWNSEND, a
Municipal Corporation,

Defendant.

No. 1784.

State of Washington,
County of Jefferson.—ss.

I, Charles G. Warren, County Clerk of the County of Jefferson, State of Washington, and Ex-Officio Clerk of the Superior Court in and for said County, hereby certify that the foregoing attached twenty-one typewritten pages consecutively numbered 1 to 21 inclusive, contain a true and correct copy of the original summons and complaint and of the whole thereof, in the above entitled action, on file in my office, together with the endorsements thereon and the proof of service thereof; that the foregoing two consecutive typewritten attached pages numbered respectively 22 and 23, contain a true, correct and complete copy of the demurrer to the complaint in said action and of the order of the Court overruling the same on file in my office, together with the endorsements thereupon and the attached typewritten page numbered 24 is a true and correct copy of the

final judgment in said action which was recorded in the order book or journal on the 16th day of November, 1897.

Witness my hand and the Seal of the Superior Court in and for the County of Jefferson, State of Washington, this 5th day of July, 1911.

(Seal)

C. G. WARREN,
County Clerk and Ex-Officio Clerk of the Superior Court in
and for the County of Jefferson.

Indorsed: Certified Copy of Pleadings and Judgment. Case No. 1931. United States Circuit Court Western District of Washington vs. Plaintiff's Exhibit No. "H." Filed U. S. Circuit Court Western District of Washington, Aug. 29, 1911. Sam'l D. Bridges, Clerk. B. O. Wright, Deputy.

*In the Superior Court of the State of Washington, for
Jefferson County.*

ALONZO ELLIOTT,

Plaintiff,

vs.

THE CITY OF PORT TOWNSEND, a

Municipal Corporation,

Defendant.

No. 1784.
JUDGMENT.

Be it remembered, that this cause came on duly and regularly for hearing on the 7th day of November, A. D. 1897, upon the demurrer of the above named defendant to the complaint of the above named plaintiff, the plaintiff appearing by Robert W. Jennings, one of his attorneys of record, and the defendant appearing by S. A. Plumley, its attorney of record, and after argument of counsel for the respective parties the said cause

was submitted to the Court for its consideration and determination, and the Court being fully advised in the premises, and good cause appearing therefor, overruled the said demurrer; whereupon the attorney for the said defendant announces in open Court that the said defendant elects to stand upon the said demurrer and refuses to plead further to said complaint; and the said defendant electing to stand upon the said demurrer and failing and refusing to plead further to said complaint;

Now, therefore, by reason of the said premises and the law in such case made and provided, and upon the application of the above named plaintiff, it is hereby ordered, adjudged and decreed, that the said plaintiff, Alonzo Elliott, have and recover from the above named defendant, The City of Port Townsend, the full just sum of \$1,523.42, and that the said amount draw interest at the rate of ten per cent. per annum from the date hereof until paid, and the plaintiff's costs and disbursements herein to be taxed.

Done in open Court this 14th day of November, 1897, at 9:30 o'clock of the forenoon of said day.

JAS. G. McCLINTON, Judge.

Indorsed: Filed this 16th day of Nov. 1897, J. N. Laubach, Clerk. Recorded J. 17-P. 37. Ex. D. 34.

*In the Superior Court of the State of Washington, in and for
the County of Jefferson.*

ALONZO ELLIOTT,

Plaintiff,

vs.

THE CITY OF PORT TOWNSEND,

Defendant.

NOTICE OF
APPEAL.

*To Messrs. Preston, Carr and Gilman and R. W. Jennings,
attorneys for the plaintiff in the above entitled action:*

Please take notice that the defendant, the City of Port Townsend, hereby appeals to the Supreme Court of the State of Washington from the judgment rendered and entered in said action on the 16th day of November, 1897, in favor of said plaintiff and against said defendant for the sum of \$1,523.42 and costs.

S. A. PLUMLEY,

Defendant's Attorney.

Service of the foregoing notice of appeal admitted this 14th day of February, 1898.

R. W. JENNINGS,

One of Attorneys for Plaintiff.

Indorsed: Filed 14th day of Feb., 1898. J. N. Laubach,
Clerk. Recorded J. 17. P. 91.

State of Washington
County of Jefferson—ss.

I, C. G. Warren, Clerk of the Superior Court of the State of Washington, in and for the County of Jefferson, holding terms at Port Townsend, Washington, do hereby certify that the foregoing is a full, true and correct copy of the original Judgment and Notice of Appeal and the Admission of Service of said Notice of Appeal in cause No. 1784 of said Court, wherein Alonzo Elliott is Plaintiff and the City of Port Townsend is defendant, as the same appears of record in my office, and I further certify that the said original Judgment was filed in my office on November 16, 1897.

Witness my hand and the seal of said Court this 26th day of August, 1911.

(Seal)

C. G. WARREN,
Clerk of said Superior Court.

State of Washington
County of Jefferson—ss.

I, Lester Still, Judge of the Superior Court of the State of Washington in and for the County of Jefferson, do hereby certify that the said Court is a Court of record having general common law jurisdiction; that at the date of the foregoing certificate the said C. G. Warren was the duly elected, qualified and acting Clerk of said Court; that the said certificate is in due form of law, and that the signature appearing to the said certificate is the genuine signature of the said C. G. Warren, as I verily believe.

Witness my hand and the seal of said Court this 28th day of August, 1911.

(Seal)

LESTER STILL,
Judge of said Court.

Indorsed: Defendant's Exhibit No. "1." Filed U. S. Circuit Court, Western District of Washington, Aug. 29, 1911, Sam'l D. Bridges, Clerk, B. O. Wright, Deputy.

DEFENDANT'S EXHIBIT 2**ORDINANCE NO. 585.**

AN ORDINANCE fixing the time of meeting of the Common Council of the City of Port Townsend, and repealing Ordinance No. 470, and all other ordinances on that subject.

The City of Port Townsend does ordain as follows:

Section 1. That the time of meeting of the Common Council of the City of Port Townsend be, and the same is hereby fixed at the hour of eight o'clock P. M., of the first and third Tuesdays of each of the months of April, May, June, July, August, September and October, and at the hour of half past seven o'clock P. M., of the first and third Tuesdays of each of the months of December, January, February and March of each year.

Section 2. That Ordinance No. 470 entitled "An ordinance fixing the time of meeting of the Common Council of the City of Port Townsend, and all other ordinances on that subject, be, and the same are hereby repealed.

Section 3. That this ordinance shall take effect and be in force from and after five days from the date of its publication.

Passed by the Common Council November 19, 1895.

Approved by the Mayor, November 21, 1895.

JERRY S. ROGERS, Mayor.

Attest: M. M. SMITH, City Clerk.

Date of Publication, November 24, 1895.

State of Washington
County of Jefferson—ss.

I, George Anderson, City Clerk of the City of Port Townsend, Washington, do hereby certify that the foregoing is a full, true and correct copy of Ordinance No. 585 entitled An ordi-

nance fixing the time of meeting of the Common Council of the City of Port Townsend, and repealing Ordinance No. 470 and all other ordinances on that subject, as the same appears in the ordinance book of said City, and as the same was introduced in evidence in the case of David Perkins vs. C. L. Intermela, et al.

Witness my hand and the seal of said City this 13th day of September, 1911.

(Seal)

GEORGE ANDERSON, Clerk.

Indorsed: Deft's. Exhibit No. 2. Filed U. S. Circuit Court, Western District of Washington, Sep. 15, 1911. Sam'l D. Bridges, Clerk, B. O. Wright, Deputy.

*In the United States Circuit Court, Western District of
Washington, Northern Division.*

DAVID PERKINS,

Plaintiff,

vs.

CHARLES INTERMELA and AMERI-
CAN SURETY COMPANY,

Defendants.

APPEARANCE OF CHARLES E. SHEPARD AND NOTICE.

Now comes Charles E. Shepard, a member of the Bar of this Court, and at the request of both the plaintiff and the plaintiff's present attorney of record, J. A. Bentley, Esq., enters his appearance as one of the attorneys of the plaintiff.

Dated at Seattle, Washington, April 22, 1912.

CHARLES E. SHEPARD.

To Said Defendants and U. D. Gnagey, Esq., their attorney:

You will please take notice that I have entered my appearance as above set forth as an associate attorney with J. A. Bentley, Esq., for the plaintiff and that all papers herein may be served upon me at my office, No. 614 New York Building, Seattle, Washington.

CHARLES E. SHEPARD.

Copy of within appearance and notice received and due service hereby acknowledged this 22d day of April, 1912.

U. D. GNAGEY,

Attorney for Defendants.

Indorsed: Appearance of Charles E. Shepard and Notice. Filed in the U. S. District Court, Western Dist. of Washington, Apr. 24, 1912. A. W. Engle, Clerk. By S., Deputy.

*In the District Court of the United States for the Western
District of Washington, Northern Division.*

DAVID PERKINS,

Plaintiff,

vs.

CHARLES L. INTERMELA and THE
AMERICAN SURETY COMPANY, a
Corporation of the State of New York,

BILL OF EXCEPTIONS.

Be it remembered that on the 29th day of August, 1911, the above cause came regularly on for trial before Hon. C. H. Hanford without a jury, a jury having been waived by the parties by stipulation duly filed herein. The said plaintiff appeared by his attorney J. A. Bentley, and the said defendants appeared by their attorney U. D. Gnagey. The cause was duly called for trial and the following proceedings were had:

The attorney for the plaintiff made a statement to the court of the nature of the cause and called George Anderson as a witness on behalf of the said plaintiff.

After the said witness was duly sworn and before he gave any testimony, defendants objected to the introduction of any testimony in the case on the ground that it appeared upon the face of the complaint that the court has no jurisdiction, it appearing that the said action is based on a warrant the face value of which is \$1584.4.

After argument of counsel for both parties the court overruled the objection for the time being and stated that he would consider the matter further before final judgment, to which ruling of the court defendants took an exception and the exception was duly allowed by the court.

The said witness then testified that he was city clerk of the City of Port Townsend, Washington, and had been such

clerk for four years and seven months. Witness then stated that he had with him the following named papers from the records and documents in his office: A duplicate receipt signed by the defendant Charles Intermela, as Treasurer of the City of Port Townsend, dated January 11, 1909, also other duplicate receipts dated as follows, one dated February 8, 1909, one dated March 11, 1909, one dated July 12, 1909, one dated October 11, 1909, one dated November 10, 1909, one dated December 13, 1909, one dated March 5, 1910, one dated April 9, 1910, one dated May 11, 1910, one dated July 9, 1910, one dated September 16, 1910, and one dated October 11, 1910. He also stated that he had with him the book marked City Ordinances containing the printed slips of the ordinances of the City of Port Townsend, also the record of the proceedings of the meetings of the city council, containing the proceedings of the city council on the 15th, 16th, and 17th, of February, 1898, also the resolution mentioned in these proceedings proposing and directing the issuing of warrants upon the Indebtedness Fund of the City of Port Townsend, also the original acceptance of the proposition signed by the attorneys on behalf of the judgment creditors.

Counsel for plaintiff then offered in evidence the said original resolution, the acceptance of the proposition contained in the resolution, together with the record of the minutes of the city council concerning the same. They were all admitted in evidence without objection, and it was agreed that certified copies of the same be substituted for the originals and the same was accordingly done, and the said exhibits are marked as follows: The resolution dated February 17th, 1898, plaintiff's exhibit "A"; the acceptance of the proposition contained in said resolution, plaintiff's exhibit "B"; and the proceedings of the city council of February 15, 16 and 17, 1898, relating to the same, plaintiff's exhibit "C"; which resolution, acceptance and minutes of the city council are respectively as follows:

Port Townsend, Wash., Feby. 17th, 1898.

Upon motion the following resolution was duly passed by the City Council:

Whereas judgment has been duly entered in the Superior Court of the State of Washington, for Jefferson County, against the City of Port Townsend, in favor of the following named parties, for the following amounts respectively to-wit:

Merchants Bank of Port Townsend.....	\$14,375.28
Manchester Savings Bank.....	7,788.71
Commercial Bank of Port Townsend....	10,324.44
John Barneson	4,587.33
Bank of British Columbia.....	18,600.15
E. M. Johnson.....	1,812.23
First National Bank of Port Townsend	7,625.00
E. Heuschober	482.65
Alonzo Elliott	1,400.00 (about)

Together with costs and interest from date of judgments at 10% per annum.

And whereas the said parties have duly presented the said claims under said judgments against the City to the City Council for settlement and payment;

And whereas it is the opinion of the said Council that said claims are a just and legal obligation against the City of Port Townsend and should be satisfied and paid;

Now, therefore, be it resolved by the City Council of the City of Port Townsend that said claims and judgments be and the same are hereby allowed and ordered paid as claims against the said City and that warrants be drawn in the usual form in favor of the said respective parties for the respective amounts of the said judgments, costs and interest, on the "Indebtedness Fund" of said City, which warrants shall be signed by the City Clerk and Mayor and with the City seal attached, and delivered to the said respective parties or their attorneys immediately upon the satisfaction of said judgments of record in the

Superior Court aforesaid, that the above warrants shall draw interest at the rate of 6% per c. p. annum from date of same until paid, and also that this resolution is upon the condition that all of said parties accept the conditions herein named on or before February 17th at 3 o'clock P. M.

State of Washington, City of Port Townsend, Office of City Clerk—ss.

The undersigned City Clerk of the City of Port Townsend hereby certifies that the foregoing annexed typewritten contains a true and correct copy of an original document and the endorsements thereupon, on file in my office.

Witness my hand and the official seal of the City of Port Townsend this 19th day of May, 1911.

(Seal)

GEORGE ANDERSON, City Clerk.

Port Townsend, Wash., Feby. 17, 1898.

To the Mayor and City Council of the City of Port Townsend.

Gentlemen: We the undersigned judgment creditors of the said City of Port Townsend hereby agree to accept and do hereby accept the proposition of the said city and its council, made on the 16th day of February, 1898, to satisfy and pay our respective judgments against the said city by issuing warrants for the full amount of said judgments, interest and costs, said warrants to be drawn on the "Indebtedness Fund" of said city, and to bear interest from the date of their issue at the rate of six (6) per cent. per annum; and hereby agree to cancel said judgments in full of record in the Superior Court of Jefferson County, Washington, upon the receipt of said warrants.

Bank of British Columbia, of Victoria, B. C.

First National Bank of Port Townsend.

E. M. Johnson

Emil Heuschöber

By Morris B. Sachs, Attorney of record in said causes
for said judgment creditors.

The Merchants Bank of Port Townsend
 The Commercial Bank of Port Townsend
 John Barneson
 Manchester Savings Bank

By W. W. Felger, Attorney of record in said causes
 for said last four named judgment creditors.

Alonzo Elliott

By Preston, Carr, Gilman, R. W. Jennings, his At-
 torneys.

State of Washington, City of Port Townsend, Office of City
 Clerk—ss.

The undersigned City Clerk of the City of Port Townsend
 hereby certifies that the foregoing annexed typewriting contains
 a true and correct copy of an original document and the en-
 dorsement thereon, on file in my office.

Witness my hand and the official seal of the City of Port
 Townsend this 19th day of May, 1911.

(Seal)

GEORGE ANDERSON, City Clerk.

Port Townsend, Wash., Feby. 15/98.

The City Council of the City of Port Townsend met in regu-
 lar session today at 7:30 P. M. at the council chambers. At
 the call of the roll there were present:—the Mayor, the City
 Atty. the City Marshall and all of the seven councilmen.

The minutes of the preceding regular meeting were read and
 approved. * * *

Under the call of new business, the clerk read notice of
 Atty's. in the street grade warrant cases * * *

After which on motion the council took a recess until 3
 o'clock P. M. Feby. 16th, 1898.

Port Townsend, Wash., Feby. 16th, 1898.

The City Council met at 3 o'cl. P. M. to-day, after expir-
 ation of recess in continuation of yesterday's meeting, and

after being called to order, the call of roll showed present his Honor the Mayor and Pr. Officer, the City Clerk, the City Atty. and all of the seven members of the Council.

Councilmen Hastings moved to pay the judgment holders in street grade warrant cases lately decided, 5% p. a. interest on the warrants from date of their issue to date of and 6% p. a. on the warrants to be issued in satisfaction of the judgments. This motion was seconded by Councilman Peterson.

Councilman Tanner proposed to amend by making this payment conditioned on acceptance by creditors tomorrow at 3 o'clock P. M.

At the suggestion of Councilman Oliver, attorney for some of the said creditors, W. W. Felger, then addressed the council and stated (in effect) that his clients would not accept that proposition, and that he felt quite certain that those represented by Judge Sachs would not do so either. He believed, however, the latter would accept (as he felt positive his clients would) the proposition to issue warrants bearing 6% interest from date of warrant for the amount of judgment.

Councilman Peterson moved to amend by making warrants pay 6% p. a. interest and to be issued for amount of judgment. This was seconded, put to vote and carried.

Councilman Plummer then moved to amend so as to make this conditional on acceptance by 3 o'clock P. M. tomorrow. This was also seconded and carried.

A resolution was then drawn up covering exactly the meaning of above, and on motion of Councilman Oliver, seconded by Councilman Peterson, it was adopted.

On motion, council then took a further recess until 4 o'clock P. M. February 17th, 1898.

Port Townsend, Feb. 17th, 1898.

The City Council of the City of Port Townsend met at 4 o'clock P. M. today, at the council chamber, after expiration of recess and in continuation of the regular meeting of February 15th, 1898.

At the call of the roll there were present his Honor the Mayor and Presiding Officer, the City Clerk and all of the seven members of the Council.

The Mayor then asked whether any acceptance by judgment holders of the proposition to satisfy judgments in the street grade warrant cases had been filed. This being answered by the clerk affirmatively, said answer was read by him. It was an unconditional acceptance of said proposition by the said holders as far as represented by Attorneys W. W. Felger and M. B. Sachs.

After this reading Attorney R. W. Jennings made a statement regarding judgment held by Alonzo Elliott, and represented by him. He stated that his client had a street grade warrant older than the above others and also held a judgment prior in time to theirs, but that he had not been notified of this proposition, but had only learned of it this morning. He was also willing to accept said proposition, and asked that his client's name be included in the resolution by which said proposition had been made. After some discussion Councilman Hastings left, being excused on account of the pressing business, and the City Attorney came in and took his seat.

The Mayor then asked the City Attorney whether he had a contract with the city for remuneration on appeal to Supreme Court in the case represented by Attorney Jennings. The city attorney replied that he had such contract and replied to a question put later on by Councilman Torgusen that in case the city did not appeal the Jennings case the city would owe him nothing on that score.

Councilman Tanner, seconded by Councilman Plummer, then moved that the Jennings judgment be included in said resolution, which was carried.

Councilman Oliver, seconded by Councilman Peterson, then moved that the clerk be instructed to draw warrants according to the resolution, and in denominations such as the respective

attorneys might desire. This was carried, after which the council, on motion, adjourned.

D. H. HILL, Mayor.

AUGUST DUDDENHAUSEN, City Clerk.

State of Washington,
City of Port Townsend,
Office of City Clerk—ss.

The undersigned City Clerk of the City of Port Townsend hereby certifies that the foregoing annexed typewriting contains a true and correct copy of that portion of the record of the proceedings of the City Council of the City of Port Townsend on the fifteenth, sixteenth and seventeenth days of February, 1898, which relates to street grade warrant cases, judgments therein and the payment of said judgments.

Witness my hand and the official seal of the City of Port Townsend thisday of May, 1911.

(Seal)

GEORGE ANDERSON,
City Clerk.

Counsel for plaintiff then offered in evidence certain receipts signed by the defendant Charles Intermela, City Treasurer, which were produced by the clerk.

Counsel for defendants objected to the introduction of the receipts on the ground that they were not the best evidence, and upon the grounds that they are incompetent, irrelevant and immaterial and do not tend to prove any issues in this cause. Thereupon the following conversation took place between the court and counsel for plaintiff:

THE COURT: These receipts, I understand, are signed by the treasurer; and who are they issued to?

MR. BENTLEY: They are issued to—I will read one of them, and is substantially like all of them: "Received from H. A. Hart, county treasurer, the sum of eight hundred fifty-one dollars and 23-100ths (\$851.23) for said city, for city's portion

account of sales collected, in December, 1908; signed, January 11, 1909."

THE COURT: Now, in the ordinary course of business, was this receipt delivered by the city treasurer to the clerk of the city in addition to the county treasurer, or how was that?

MR. BENTLEY: This is through the statute which requires them to deliver to the city clerk a duplicate of the receipt.

THE COURT: This is, then, by the treasurer turned in to the city clerk?

MR. BENTLEY: The city treasurer delivers to the city clerk a duplicate of the one he gives to the county treasurer for the money he receives, and these are the duplicates turned in to the city clerk.

The court then overruled the objection of defendants and they were admitted in evidence, to which ruling of the court defendants took an exception and the same was allowed.

Receipts introduced in one block, marked plaintiff's exhibit "D," and admitted in evidence.

According to the stipulation on file herein, plaintiff offered in evidence section 9 of Ordinance No. 722, entitled "An Ordinance defining the duties of the city treasurer of the City of Port Townsend," and approved on the 4th day of December, 1906, and said section 9 was read in evidence and the same is as follows:

"It shall be the duty of the city treasurer to turn into the indebtedness fund all moneys received by the city from the county of Jefferson for its share of the proceeds of the sales of any county property, and all moneys from city taxes, penalties and interest, excepting moneys collected for the payment of any city bonds, and excepting the tax levies for the three preceding years, which he shall segregate, immediately upon receipt, into the respective funds of the city according to the respective levies therefor, until all the legal outstanding claims against the 'indebtedness fund' of the city shall have been paid, but the city treasurer shall pay no 'indebtedness fund' warrant, excepting

the 'general expense,' 'fire and water,' 'light' and 'road' fund warrants without the special order of the city council."

The defendant city treasurer then, in response to the requirements of the court, and at the request of counsel for plaintiff, produced certain letters from the county treasurer to the city treasurer and offered each and all of said letters in evidence.

Defendants objected to the introduction of any of these papers in evidence, for the reason that they have not been identified as any official papers belonging to the City of Port Townsend, or of any records of the treasurer's office; and further objected to them on the ground that they are incompetent, irrelevant and immaterial, they not showing the receipt of any moneys belonging to the "indebtedness fund" of said city. The court overruled the objection and defendants took an exception and the exception was allowed by the court. One of the letters was then read, as follows:

"Office of the County Treasurer, Jefferson County, Port Townsend, Washington, January 11, 1909: Hon. C. L. Intermela, City Treasurer. Dear Sir: Herewith enclosed I beg to hand you my official check No. 2056, Merchants Bank of Port Townsend, Washington, payable to your order for the sum of (\$2784.63) Two Thousand, seven hundred eighty-four dollars and sixty-three cents, being in full amount collected by me and due the city of Port Townsend, Washington, in the month of December, 1908, as follows:

From sales of county real estate, lands and premises	\$ 851.23
From year 1904 tax rolls.....	.96
From year 1905 tax rolls.....	1.44
1906 tax rolls	8.14
1907 tax rolls	1922.86
 Total	 \$2784.63

Please acknowledge this remittance as usual and oblige,
Yours truly,

(Signed) HARRY A. HART.

Treasurer of Jefferson County, Washington.

The other letters were then read by date and that part which refers to the amount of sales from the property, as follows:

Letter dated February 6, 1909, from sales of county property	\$1757.86
Letter March 9, 1909, from sales of county real estate, lands and premises.....	320.82
May 10, 1909, sales county real estate, lands and premises acquired by tax foreclosure sale and deed situated within the corporate limits of the City of Port Townsend, Wash- ton, during the month of April, 1909, as follows	598.58
Letter July 10, 1909, from sales of county real estate	32.96
Letter June 11, 1909, from sales of county real estate land and premises.....	38.20
Letter Oct. 8, 1909, from sales of county realty	120.96
Letter Nov. 9, 1909, from sales of county realty	71.11
Letter Dec. 11, 1909, from sales of county realty	20.82
Letter March 4, 1910, from sales of county realty	3616.89
Letter April 8, 1910, from sales of county realty	710.78
Letter July 8, 1910, from sales of county realty	3.30
Letter May 10, 1910, from sales of county realty	77.30

It was admitted by counsel for the respective parties that all of the sales are mere sales of county property that had been acquired by the county by the foreclosure of taxes.

A portion of warrant call No. 23, dated April 15th, 1908, was then offered and read in evidence as follows:

"Notice is hereby given that all outstanding warrants issued by the City of Port Townsend, Washington, drawn on the following funds are now due and payable, namely: General Expense, Fire and Water and Road Fund, issued on or prior to February 2, 1898, total amount outstanding this date, \$448.03 (not including interest). Interest ceases on said named warrants on the 31st day of December, 1907. * * *

(Signed) C. L. INTERMELA, City Treasurer.

Date of first publication, April 15, 1908."

It was then admitted by both parties that on December 1, 1910, warrant No. 2, belonging to this plaintiff, was presented to the City Treasurer, the defendant Charles Intermela, at his office in the City of Port Townsend, and payment demanded and payment was refused by defendant Intermela.

On August 31, 1911, after the case had been taken under advisement by the court, the attorneys for the respective parties made a stipulation defining the scope of the above admission, which was filed with the papers on September 11, 1911, for consideration of the court in deciding the case, and is as follows:

*In the Circuit Court of the United States for the Western
District of Washington, Northern Division.*

DAVID PERKINS,

Plaintiff,

vs.

CHARLES L. INTERMELA and THE
AMERICAN SURETY COMPANY,
a Corporation of the State of New
York,

Defendants

No. 1931.

It is hereby stipulated and agreed that the admission of defendants' counsel on the trial to the effect, that warrant No. 2 was presented for payment and payment refused, on December 1, 1910, shall for the purpose of this cause be taken and given effect by the court as also admitting the substance and form of the warrant and the endorsements thereupon to be as alleged in lines 1 to 28 and first five words of line thirty, page 4, of plaintiff's complaint. This stipulation shall not be construed as a waiver of the affirmative defenses nor of either of them, set up in defendant's answer. Nor as a waiver of the right to set up against the plaintiff any defense that might have been set up against the original holder of said warrant.

Dated August 31, 1911.

J. A. BENTLEY,

Plaintiff's Attorney.

U. D. GNAGEY,

Defendant's Attorney.

The plaintiff then read in evidence the amount of the duplicate receipts heretofore identified by the city clerk, to which the defendants made objection on the ground that the same are incompetent, irrelevant and immaterial, the same not

showing that they are for moneys belonging to the indebtedness fund. The court overruled the objection and defendants took an exception which was allowed by the court. The amount of the receipts was read in evidence as follows:

The receipt of January 11, 1909, is for \$851.23; February 8, 1909, \$1757.86; March 11, 1909, \$320.82; July 12, 1909, \$327.96; October 11, 1909, \$120.96; November 10, 1909, \$71.11; December 13, 1909, \$20.82; December 31, 1909, \$429.80; March 5, 1910, \$3616.89; April 9, 1910, \$710.78; May 11, 1910, \$77.33; July 9, 1910, \$3.30; September 10, 1910, \$44.47; October 11, 1910, \$225.62.

Defendants objected to the introduction of these amounts on the ground that they are incompetent, irrelevant and immaterial. The objection was overruled and exception reserved and allowed.

The plaintiff further to maintain his case introduced in evidence a certified copy of the judgment roll in cause No. 1784 in the Superior Court of the State of Washington for the County of Jefferson, wherein Alonzo Elliott was plaintiff and the City of Port Townsend was defendant, which judgment roll consists of a summons and complaint and proof of service on the Mayor of Port Townsend. Defendant's demurrer to the complaint upon the grounds that it does not state facts sufficient to constitute a cause of action, order overruling the demurrer and final judgment in favor of the plaintiff against the defendant for the sum of \$1523.42 and that the said amount draw interest at the rate of ten per cent. per annum from the date thereof until paid, and the plaintiff's costs and disbursements to be taxed, signed by the judge of the court November 14, 1897.

It was conceded by the attorneys of the respective parties that the copy of the complaint set out in the certified copy of the judgment roll was identical with the copy of the complaint set out in defendant's answer and that in making up the record the complaint as set out in the certified copy of the judgment roll should be omitted, which was approved by the court:

Defendant's counsel objected to the introduction of said certified copy of the judgment roll for the reason that the copy of the final judgment does not show the file mark by the clerk.

The court overruled the objection and defendants excepted to such ruling and the exception was duly noted.

Plaintiff then announced that he rests and thereupon defendants made a motion for a non-suit on the following grounds:

That the plaintiff has not shown as alleged in his complaint or at all that it was the treasurer's duty to pay this warrant.

2. That the plaintiff has not shown that at the time alleged in the complaint, or at any time, the said treasurer had sufficient funds on hand to pay said warrant.

After argument of counsel the court denied the said motion, and defendants excepted to the ruling of the court and the exception was duly noted by the court.

Counsel for defendants then moved for a dismissal of the case as to the bonding company on the ground that no default of the treasurer has been shown upon which the bonding company could possibly be held liable.

The court denied the motion and defendants took an exception to the ruling of the court and the exception was duly noted.

Defendants then offered in evidence a certified copy of the judgment in the case of Alonzo Elliott vs. The City of Port Townsend, cause No. 1784, indicating the file mark on the judgment, and also a certified copy of the notice of appeal, together with a certified copy of the proof of service of the notice of appeal and the file mark on it.

Plaintiff objected to the introduction of said record. The court overruled the said objection and noted an exception for the said plaintiff.

Record admitted in evidence and marked defendants' exhibit "1," and the said record is as follows:

In the Superior Court of the State of Washington for Jefferson County.

ALONZO ELLIOTT,

Plaintiff,

vs.

THE CITY OF PORT TOWNSEND,

a Municipal Corporation,

Defendant.

No. 1784.

JUDGMENT.

Be it remembered, that this cause came on duly and regularly for hearing on the 7th day of November, A. D. 1897, upon the demurrer of the above-named defendant to the complaint of the above-named plaintiff, the plaintiff appearing by Robert W. Jennings, one of his attorneys of record, and the defendant appearing by S. A. Plumley, its attorney of record, and after argument of counsel for the respective parties the said cause was submitted to the court for its consideration and determination, and the court being fully advised in the premises, and good cause appearing therefor, overruled the said demurrer; whereupon the attorney for the said defendant announces in open court that the said defendant elects to stand upon the said demurrer and refuses to plead further to said complaint; and the said defendant electing to stand upon the said demurrer and failing and refusing to plead further to said complaint.

Now, therefore, by reason of the said premises and the law in such cases made and provided, and upon the application of the above named plaintiff, it is hereby ordered, adjudged and decreed, that the said plaintiff, Alonzo Elliott, have and recover from the above named defendant, The City of Port Townsend, the full sum of \$1523.42 and that the said amount draw interest at the rate of ten per cent. per annum from the date

hereof until paid, and the plaintiff costs and disbursements herein to be taxed.

Done in open court this 14th day of November, 1897, at 9:30 o'clock in the forenoon of said day.

JAMES G. McCLINTON, Judge.

(Endorsed) Filed this 16th day of Nov., 1897.

J. N. LAUBACH, Clerk.

Recorded J 17, p. 37, Ex. D 34.

*In the Superior Court of the State of Washington in and for
the County of Jefferson.*

ALONZO ELLIOTT,

Plaintiff,

vs.

THE CITY OF PORT TOWNSEND,

Defendant.

NOTICE OF APPEAL.

To Messrs. Preston, Carr and Gilman and R. W. Jennings, attorneys for the plaintiff in the above entitled action.

Please take notice that the defendant, The City of Port Townsend, hereby appeals to the Supreme Court of the State of Washington from the judgment rendered and entered in said action on the 16th day of November, 1897, in favor of said plaintiff and against said defendant for the sum of \$1523.42.

S. A. PLUMLEY,
Defendant's Attorney.

Service of the foregoing notice of appeal admitted this 14th day of February, 1898.

R. W. JENNINGS,
One of Attorneys for Plaintiff.

(Endorsed) Filed 14th day of February, 1898.

J. N. LAUBACH, Clerk.

Recorded J 17, P. 91.

State of Washington,
County of Jefferson.—ss.

I, C. G. Warren, Clerk of the Superior Court of the State of Washington in and for the County of Jefferson, holding terms at Port Townsend, Washington, do hereby certify that the foregoing is a full, true and correct copy of the original judgment and notice of appeal and the admission of service of said notice of appeal in cause No. 1784 of said court, wherein Alonzo Elliott is plaintiff and the City of Port Townsend is defendant, as the same appears of record in my office, and I further certify that the said original judgment was filed in my office on November 16, 1897.

Witness my hand and seal of said court this 26th day of August, 1911.

(Seal of Court)

C. G. WARREN,
Clerk of Said Superior Court.

State of Washington,
County of Jefferson.—ss.

I, Lester Still, Judge of the Superior Court of the State of Washington in and for the County of Jefferson, do hereby certify that the said court is a court of record having common law jurisdiction; that at the date of the foregoing certificate the said C. G. Warren was the duly elected, qualified and acting clerk of said court; that the said certificate is in due form of law, and that the signature appearing to the said certificate is the genuine signature of the said C. G. Warren, as I verily believe.

Witness my hand and the seal of said court this 28th day of August, 1911.

(Seal of Court)

LESTER STILL,
Judge of said Court.

Mr. George Anderson, city clerk, was called to the witness stand and upon being questioned referred to the ordinance in the Ordinance Book providing for the regular meetings of the City Council, the said ordinance being Ordinance No. 585.

The said ordinance was admitted in evidence without objection and a certified copy thereof ordered to be substituted by the court and such copy marked defendants' exhibit "2," which said ordinance reads as follows:

"An ordinance fixing the time of meeting of the Common Council of the City of Port Townsend, and repealing ordinance No. 4&0, and all other ordinances on that subject.

The City of Port Townsend does ordain as follows:

Section 1. That the time of meeting of the Common Council of the City of Port Townsend be and the same is hereby fixed at the hour of eight o'clock P. M. of the first and third Tuesdays of each of the months of April, May, June, July, August, September and October, and at the hour of half past seven o'clock P. M. of the first and third Tuesdays of each of the months of November, December, January, February and March of each year.

Section 2. That ordinance No. 470, entitled An ordinance fixing the time of meeting of the Common Council of the City of Port Townsend, and all other ordinances on that subject, be and the same are hereby repealed.

Section 3. That this ordinance shall take effect and be in force from and after five days from the date of its publication.

Passed by the Common Council November 19, 1895.

Approved by the Mayor November 21, 1895.

JERRY S. ROGERS, Mayor.

Attest: M. M. SMITH, City Clerk.

Date of publication, November 24, 1895.

State of Washington,
County of Jefferson.—ss.

I, George Anderson, City Clerk of the City of Port Townsend, Washington, do hereby certify that the foregoing is a full, true and correct copy of ordinance No. 585, entitled "An ordinance fixing the time of meeting of the common council of the City of Port Townsend, and repealing ordinance No. 470 and all other ordinances on that subject, as the same appears in the ordinance book of said city, and as the same was introduced in evidence in the case of David Perkins vs. C. L. Intermela et al.

Witness my hand and the seal of said city this 13th day of September, 1911.

(Seal)

GEORGE ANDERSON,
City Clerk.

It was admitted by counsel that no special order of the city council was ever made authorizing or directing the said defendant treasurer to pay the warrant involved in this section.

Defendants then rested and plaintiff announced that he had no further evidence in rebuttal.

Defendants then renewed their motion for a non-suit on the following grounds:

That the evidence does not show that at the time alleged in the complaint or at any time, it became the duty of the city treasurer to pay this warrant.

2. That the evidence does not show that at the time alleged in the complaint or at any time the treasurer had sufficient funds in his possession properly applicable to the payment of this warrant to pay the same.

The motion was denied, an exception taken by the defendants and the exception duly noted by the court.

The defendants then and there upon the submission of the cause to the court for decision requested the judge who tried the same to make special findings of fact, which said request was granted.

In the U. S. District Court,
Western District of Washington.—ss.

Inasmuch as the proceedings, evidence, objections, rulings and exceptions contained in the foregoing bill do not appear on record in this cause, I, C. H. Hanford, Judge of the said Court, who tried the said cause, after due notice given to the plaintiff in said cause as required by law and the rules of court, have settled and signed and do hereby settle and sign said bill of exceptions and have ordered and do hereby order the same to be made a part of the record in this cause. I further certify that the foregoing is a true bill of exceptions; that the matters and proceedings embodied therein are matters and proceedings occurring in the said cause and the same are hereby made part of the record herein; and that the same contains all the material facts, matters and proceedings heretofore occurring in the cause and not already a part of the record herein, and I further certify that the same contains all the evidence introduced at the trial of said cause.

Witness my hand this 22d day of April, 1912.

C. H. HANFORD,
Judge of the said District Court.

Copy of the foregoing received and service thereof accepted this 22d day of April, 1912.

J. A. BENTLEY and
CHARLES E. SHEPARD,
Attorneys for Plaintiff.

Indorsed: Bill of Exceptions. Filed in the U. S. District Court, Western Dist. of Washington, Apr. 24, 1912. A. W. Engle, Clerk. By S., Deputy.

*In the District Court of the United States for the Western
District of Washington. Northern Division.*

DAVID PERKINS,

Plaintiff,

VS.

CHARLES L. INTERMELA and THE
AMERICAN SURETY COMPANY,
a Corporation of the State of New
York,

Defendants.

AT LAW—PETITION FOR WRIT OF ERROR.

And now come Charles L. Intermela and The American Surety Company, defendants herein, and say that on or about the 15th day of February, 1912, this court entered judgment herein in favor of the plaintiff and against these defendants in which judgment and the proceedings had prior thereto in this cause certain errors were committed, to the prejudice of these defendants, all of which will more in detail appear from the assignment of errors which is filed with this petition.

Wherefore these defendants pray that a writ of error may issue in this behalf out of the United States Circuit Court of Appeals for the Ninth Circuit, for the correction of errors so complained of, and that a transcript of the record, proceedings and papers in this cause, duly authenticated, may be sent to the said Circuit Court of Appeals.

U. D. GNAGEY,
Attorney for Defendants.

Indorsed: Petition for Writ of Error. Filed in the U. S. District Court, Western Dist. of Washington, Apr. 24, 1912. A. W. Engle, Clerk. By S., Deputy.

*In the District Court of the United States for the Western
District of Washington. Northern Division.*

DAVID PERKINS,

Plaintiff,

vs.

CHARLES L. INTERMELA and THE
AMERICAN SURETY COMPANY, a
Corporation of the State of New York,
Defendants.

No. 1931.

ASSIGNMENT OF ERRORS.

The defendants in this action above named in connection with their petition for a writ of error, make the following assignment of errors which they aver occurred upon the trial of the cause, to-wit:

1. The court erred in denying defendants' motion to make paragraph six of plaintiff's complaint more definite and certain by stating the facts which plaintiff claims made it the duty of the city treasurer to pay the warrant in this action and by stating the time when it so became the duty of said treasurer.

2. The court erred in overruling defendants' objection to the jurisdiction of the court, on the ground that the amount in controversy exclusive of interest and cost is less than two thousand dollars, the complaint showing that the action is on a warrant the face value of which is \$1548.12.

3. The court erred in admitting in evidence the duplicate receipts of the city treasurer on file in the office of the city clerk, designated as plaintiff's exhibit "D," showing the receipt from the county treasurer of Jefferson County by the city treasurer of the city's portion of the proceeds of the sale of county property, one of which said receipts was read in evidence and is as follows:

“Received from H. A. Hart, County Treasurer, the sum of eight hundred fifty-one dollars and 23-100ths (\$851.23) for said city, for city’s portion account of sales collected, in December, 1908; signed, January 11, 1909.”

4. The court erred in admitting in evidence the letters of the county treasurer of Jefferson County to the defendant Intermela as city treasurer, accompanying remittances of money from the county treasurer to the city treasurer, one of which was read in evidence and is as follows, the others being read simply by date and that portion referring to proceeds of sales of county property, to-wit:

“Office of the County Treasurer, Jefferson County, Port Townsend, Washington, January 11, 1909: Hon. C. L. Intermela, City Treasurer. Dear Sir: Herewith enclosed I beg to hand you my official check No. 2056, Merchants Bank of Port Townsend, Washington, payable to your order for the sum of (\$2784.63) two thousand, seven hundred eighty-four dollars and sixty-three cents, being in full amount collected by me and due the City of Port Townsend, Washington, in the month of December, 1908, as follows:

From sales of county real estate lands and premises	\$ 851.23
From year 1904 tax rolls.....	.96
From year 1905 tax rolls.....	1.44
1906 tax rolls	8.14
1907 tax rolls	1922.86
<hr/>	
Total	\$2784.63

Please acknowledge this remittance as usual and oblige.

Yours truly,

(Signed) HARRY HART,
Treasurer of Jefferson County, Washington.”

5. The court erred in admitting in evidence the certified copy of the judgment roll in the case of Alonzo Elliott vs. The

City of Port Townsend, cause No. 1784, of the Superior Court of the State of Washington for Jefferson County, plaintiff's exhibit "H."

6. The court erred in denying defendants' motion for a non-suit at the close of plaintiff's testimony on the ground that plaintiff has not shown as alleged in his complaint or at all that it was the treasurer's duty to pay the warrant in suit.

7. The court erred in denying defendant's motion for a non-suit at the close of plaintiff's testimony on the ground that the plaintiff has not shown that at the time alleged in his complaint, or at any time, the said treasurer had sufficient funds on hand to pay the said warrant.

8. The court erred in denying defendants' motion at the close of plaintiff's testimony for a dismissal of the case as to the bonding company on the ground that no default of the treasurer has been shown upon which the bonding company could possibly be held liable.

9. The court erred in denying defendants' motion for a non-suit at the close of all the testimony on the ground that the evidence does not show that at the time alleged in the complaint or at any time it became the duty of the city treasurer to pay the warrant in suit.

10. The court erred in denying defendants' motion for a non-suit at the close of all the testimony on the ground that the evidence does not show that at the time alleged in the complaint or at any time the treasurer had sufficient funds in his possession properly applicable to the payment of the said warrant to pay the same.

11. The court erred in making the finding that the matter in dispute in the action, exclusive of interest and costs, exceeds the sum of two thousand dollars.

12. The court erred in finding that the action brought by Alonzo Elliott against the City of Port Townsend on the 19th day of August, 1897, in the Superior Court of the State of Washington for the County of Jefferson, being cause No. 1784 of said court, was "an action for damages for breach of con-

tract," without specifically stating that said suit was on a street grade warrant drawn on a special fund of a local improvement district in said city.

13. The court erred in making that portion of the fourth finding of fact in which it is found that the regular meeting of the city council, held on February 15, 1898, continued its sessions upon two succeeding days.

14. The court erred in refusing to find that the City of Port Townsend duly appealed to the Supreme Court of the State of Washington from the judgment in the case of Alonzo Elliott against the City of Port Townsend, cause No. 1784 of said court, and that such appeal was pending at the time the city council ordered the warrant drawn that is involved in this action in satisfaction of the judgment in said cause.

15. The court erred in refusing to make the sixth finding proposed by the defendants which reads as follows:

"That at the time and at all the times herein mentioned ordinance No. 585 of the said city was in force, which said ordinance provided that the regular meetings of the city council of said city shall be held on the first and third Tuesdays of each month."

16. The court erred in refusing to make the seventh finding proposed by the defendants, which reads as follows:

"That on February 15, 1898, that being the third Tuesday in said month, the said city council held a regular meeting, and then took a recess till February 16, 1898, at three o'clock P. M., without stating for what purpose said recess was taken.

17. The court erred in refusing to make the eighth finding proposed by the defendants, which reads as follows:

"That on the following day, February 16, 1898, the said city council met at three o'clock P. M., after the expiration of said recess, and after passing a resolution with reference to certain judgments that had been recently obtained against the city on street grade warrants, took a further recess till four o'clock P. M. of the following day; and at four o'clock P. M. of the following day, that is February 17, 1898, the said city

council again met, and ordered the issuing of the warrant sued on herein.

17. The court erred in refusing to make the tenth finding proposed by the defendants (second finding marked 10), which reads as follows:

“That at the time the said judgment was so rendered in cause No. 1784, and before the issuance of the said warrant, and before the same was ordered to issue by the city council, there were outstanding about \$130,000 of street grade warrants issued on special funds of local improvement districts in said City of Port Townsend; that the said City of Port Townsend duly appealed from the judgment rendered against it in said cause of Alonzo Elliott vs. The City of Port Townsend, cause No. 1784, but before the record in said cause was sent to the Supreme Court for review, and long before the time expired within which said cause could be reviewed by said court, the said City Council of the City of Port Townsend entered into an agreement with the holders of all of said street grade warrants, including the holder of the warrant reduced to judgment in said cause No. 1784, agreeing that the said city would not defend actions brought on street grade warrants nor appeal from judgments rendered on such warrants nor in any wise resist payment of such judgments, but would satisfy all of such judgments so acquired and rendered, including the judgment rendered in said cause No. 1784, by issuing warrants bearing six **per cent. on the indebtedness** fund of said city in satisfaction of such judgments; that long before the city council of said city entered into said agreement with said street grade warrant holders, and long before the rendition of the judgment in said cause No. 1784 aforesaid, the Supreme Court of the State of Washington had decided that under no circumstances can a city be held liable on a street grade warrant issued on a special fund; that notwithstanding said decision, the city council of said city entered into said agreement, and in furtherance of said agreement and in compliance therewith, the said city council abandoned the said appeal from the judgment in said cause

No. 1784, and voluntarily ordered the issuance of the warrant described in plaintiff's complaint in satisfaction of said judgment; that under the said agreement and in pursuance thereof about \$100,000 of street grade warrants were reduced to judgment against the said city without proper defense on the part of the said city, and indebtedness fund warrants bearing six per cent. interest issued in satisfaction of such judgments; that after said amount of such street grade warrants had been so reduced to judgment and indebtedness fund warrants issued in satisfaction thereof, and while there were still outstanding about \$30,000 of such street grade warrants not reduced to judgment, and on or about January 3, 1899, the said city council of said city repudiated and abandoned the said agreement and refused to allow any more judgments taken against the city on such street grade warrants, and refused to recognize as valid any of the indebtedness fund warrants issued in pursuance of said agreement and in satisfaction of such judgments, interest and costs, against said city, and the city council of said city has ever since refused and does now refuse to recognize any of said indebtedness fund warrants as valid obligations against said city, and still refuses to allow any more judgments taken against said city on such street grade warrants.

18. The court erred in refusing to make the eleventh finding proposed by the defendants, wherein it is found that at the time the said agreement was so made and the said indebtedness fund warrants so issued, including the said warrant of plaintiff herein, the said City of Port Townsend, was indebted beyond its constitutional limit of indebtedness for other purposes, and exclusive of the said warrants, and exclusive of the warrant of plaintiff.

19. The court erred in refusing to make the twelfth finding proposed by the defendants, in which it is found that at no time has the matter of validating the indebtedness so contracted ever been submitted to the voters of said city, and that such voters have never ratified the same.

20. The court erred in refusing to make the thirteenth finding proposed by the defendants, which reads as follows:

"That ever since the 13th day of September, 1906, city Ordinance No. 722, entitled 'An Ordinance to define the duties of the city treasurer of the City of Port Townsend,' has been and now is in force, and section 9 of said ordinance reads as follows, to-wit:

"It shall be the duty of the city treasurer to turn into the indebtedness fund all moneys derived by the city from the County of Jefferson for its share of the proceeds of the sale of any county property, and all moneys from city taxes, penalty and interest, excepting moneys collected for the payment of any city bonds, and excepting the tax levies for the three preceding years, which he shall segregate, immediately upon receipt, into the respective funds of the city according to the respective levies therefor, until all the legal outstanding claims against the 'indebtedness fund' of the city shall have been paid, but the city treasurer shall pay no 'indebtedness fund' warrant, excepting the 'general expense,' 'fire and water,' 'light' and 'road' fund warrants, without the special order of the city council; that the warrant involved in this suit is one of those warrants which the city treasurer by this ordinance is directed not to pay without a special order of the said city council, and that the said city council never made any order directing the said city treasurer to pay such warrant."

21. The court erred in refusing to make the sixteenth finding proposed by the defendants, which reads as follows:

"That the said city council, in ordering the issuing of the said warrant No. 2 on the indebtedness fund of said city, and the mayor and clerk in issuing the same in satisfaction of said judgment in cause No. 1784, acted fraudulently, and the said warrant is fraudulent and void and was issued without authority of law."

22. The court erred in holding that the Superior Court of Jefferson County, Washington, had jurisdiction in the case of Alonzo Elliott against the City of Port Townsend to render

the judgment it did render on the cause of action set forth in the complaint in said action.

23. The court erred in not holding that the warrant in suit is void because issued at an adjourned meeting of the city council, and not at a regular meeting of said council, as required by the laws of the State of Washington.

24. The court erred in not holding that the said warrant was one of a series of warrants all of which were over issued, that is, issued when the city was beyond its constitutional debt limit.

25. The court erred in not holding that the warrant in suit was issued under such circumstances and at such a time as to make it a fraud against the City of Port Townsend and against the taxpayers of said city, as a matter of law.

26. The court erred in not giving judgment in favor of the defendants.

U. D. GNAGEY,
Attorney for Defendants.

Indorsed: Assignment of Errors. Filed in the U. S. District Court, Western Dist. of Washington, April 24, 1912. A. W. Engle, Clerk, by S., Deputy.

In the Circuit Court of the United States for the Western District of Washington, Northern Division.

DAVID PERKINS,

Plaintiff,

vs.

CHARLES L. INTERMELA and THE
AMERICAN SURETY COMPANY, a
Corporation of the State of New York,
Defendants.

ORDER ALLOWING WRIT OF ERROR.

This 24th day of April, 1912, came the defendants, by their attorney, and filed herein and presented to the court their petition praying for the allowance of a writ of error, an assignment of errors intended to be urged by them, praying, also, that a transcript of the record and proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Judicial Circuit, and that such other and further proceedings may be had as may be proper in the premises.

On consideration whereof, the court does allow the writ of error upon the defendants' giving a bond according to law in the sum of forty-five hundred dollars, which shall operate as a supersedeas bond.

C. H. HANFORD, District Judge.

Indorsed: Order Allowing Writ of Error. Filed in the U. S. District Court, Western Dist. of Washington. April 24, 1912. A. W. Engle, Clerk. By S., Deputy.

In the District Court of the United States for the Western District of Washington, Northern Division.

DAVID PERKINS,

Plaintiff,

vs.

CHARLES L. INTERMELA and THE
AMERICAN SURETY COMPANY, a
Corporation of the State of New York,
Defendants.

No. 1931.

BOND ON WRIT OF ERROR.

KNOW ALL MEN BY THESE PRESENTS, That we, Charles L. Intermela and The American Surety Company as principals, and The United States Fidelity and Guaranty Company of Baltimore, Md., as surety, are held and firmly bound unto the defendant in error, David Perkins, in the full and just sum of forty-five hundred (\$4500) dollars, to be paid to the said defendant in error David Perkins, his certain attorneys, executors, administrators or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals, and dated this 24th day of April, in the year of our Lord one thousand nine hundred and twelve.

Whereas, lately at a District Court of the United States for the Western District of Washington, Northern Division, in a suit pending in said court between David Perkins, plaintiff, and Charles L. Intermela and The American Surety Company, a corporation of New York, defendants, a judgment was rendered against the said Charles L. Intermela and The American Surety Company, and the said Charles L. Intermela and The American Surety Company having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to re-

verse the judgment in the aforesaid suit, and a citation directed to the said David Perkins citing and admonishing him to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the City of San Francisco, California, in said circuit, on the 24th day of May next:

Now, the condition of the above obligation is such that if the said Charles L. Intermela and The American Surety Company shall prosecute said writ of error to effect and answer all damages and costs if they fail to make the said plea good, then the above obligation to be void, else to remain in full force and virtue.

Sealed and delivered in presence of

CHARLES L. INTERMELA. (SEAL)

THE AMERICAN SURETY CO.

By U. D. GNAGEY, Its Attorney.

UNITED STATES FIDELITY & GUARANTY CO.

By JOHN C. MCCOLLISTER, Attorney in Fact.

Approved by

C. H. HANFORD, District Judge. (SEAL)

Indorsed: Bond on Writ of Error. Filed in the U. S. District Court, Western Dist. of Washington, April 24, 1912. A. W. Engle, Clerk, by S., Deputy.

In the District Court of the United States for the Western District of Washington, Northern Division.

DAVID PERKINS,

Plaintiff,

VS.

CHARLES L. INTERMELA and THE
AMERICAN SURETY COMPANY, a
Corporation of the State of New York,
Defendants.

PRAECIPE FOR TRANSCRIPT.

To the Clerk of the Above Entitled Court:

Please make a transcript of the record in the above cause embracing the following papers for a review of the cause by writ of error from the United States Circuit Court of Appeals:

1. Complaint.
2. Appearance of U. D. Gnagey as attorney for defendants.
3. Motion to make complaint more definite and certain.
4. Order denying motion.
5. Answer of defendants.
6. Reply of plaintiff.
7. Stipulation waiving jury.
8. Stipulation relating to the introduction in evidence of city ordinances.
9. Order made on motion of plaintiff for a rule on defendant Charles L. Intermela to produce certain papers on the trial of the cause.
10. Memorandum decision on the merits.
11. Findings proposed by defendants with acceptance of service of copy of same.
12. Findings made by the court.

13. Judgment.
14. Exception to entry of judgment.
15. Motion to revise findings.
16. Order on motion to revise findings.
17. Exceptions to the special findings made by the court and the refusal of the court to make other findings.
18. Copy of all exhibits, omitting copy of complaint in plaintiff's exhibit....., according to agreement of counsel and approval of court. (See bill of exceptions, p. 14.)
19. Appearance of Charles E. Shepard as one of the attorneys for plaintiff.
20. Bill of exceptions.
21. Petition for writ of error.
22. Assignment of errors.
23. Order allowing writ and fixing supersedeas.
24. Bond on writ of error.
25. Writ of error.

Citation and admission of service.

Besides the foregoing you are to return the original writ of error and the original citation, with the admission of service and a copy of this praecipe.

U. D. GNAGEY,

Attorney for Defendants, Plaintiffs in Error.

Indorsed: Praecipe. Filed in the U. S. District Court, Western Dist. of Washington, April 26, 1912. A. W. Engle, Clerk, by S., Deputy.

*In the District Court of the United States for the Western
District of Washington, Northern Division.*

DAVID PERKINS,

Plaintiff and Defendant in Error,

VS.

CHARLES L. INTERMELA and THE

AMERICAN SURETY COMPANY, a

Corporation of the State of New York,

Defendants and Plaintiffs in Error.

No. 1931.

CLERK'S CERTIFICATE TO TRANSCRIPT OF RECORD.

United States of America,

Western District of Washington—ss.

I, A. W. Engle, Clerk of the District Court of the United States for the Western District of Washington, do hereby certify the foregoing 131 printed pages, numbered from 1 to 131, inclusive, to be a full, true and correct copy of the record and proceedings in the above and foregoing entitled cause, as is called for by the praecipe of the attorney for the defendants and plaintiffs in error, as the same remain of record and on file in the office of the clerk of said court, and that the same constitutes the return to the writ of error received and filed in the office of the clerk of the said District Court on April 24, 1912.

I further certify that I annex hereto and herewith transmit the original writ of error and citation in said cause.

I further certify that the cost of preparing and certifying the foregoing return to writ of error is the sum of \$168.20, and that the said sum has been paid to me by U. D. Gnagey, Esq., of counsel for defendants and plaintiffs in error.

IN TESTIMONY WHEREOF I have hereunto set my hand and affixed the seal of said District Court, at Seattle, in said district, this 20th day of June, 1912.

(SEAL)

A. W. ENGLE, Clerk.

The United States Circuit Court of Appeals for the Ninth Circuit.

The United States of America,
Ninth Judicial Circuit—ss.

The President of the United States to the Honorable Judge of the District Court of the United States for the Western District of Washington, Northern Division, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment, of a plea which is in the said District Court, before you or some of you, between David Perkins, plaintiff, and Charles L. Intermela and the American Surety Company, defendants, a manifest error hath happened, to the great damage of the said Charles L. Intermela and the American Surety Company, defendants, as by their complaint appears, we, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with the things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the City of San Francisco, in the State of California, in said circuit, on the 24th day of May next, in said Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Edward Douglas White, Chief Justice of the United States, this 24th day of April, A. D. 1912,

and in the one hundred and thirty-sixth year of the independence of the United States of America.

Allowed by

C. H. HANFORD,
United States District Judge.

Attest:

(SEAL)

A. W. ENGLE,
Clerk of the District Court of the United
States, Western District of Washington.

By F. A. SIMPKINS, Deputy.

Service of the within writ of error by delivery of a copy to the undersigned is hereby acknowledged this 24th day of April, 1912.

J. A. BENTLEY AND
CHARLES E. SHEPARD,
Attorneys for Defendant in Error.

Indorsed: No. 1931. In the District Court of the United States for the Western District of Washington, Northern Division. David Perkins vs. Charles L. Intermela and The American Surety Company. Writ of Error filed in the U. S. District Court, Western Dist. of Washington, April 24, 1912. A. W. Engle, Clerk, by S., Deputy.

United States of America.

The President of the United States to David Perkins and to J. A. Bentley and Charles E. Shepard, His Attorneys, Greeting:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be held at San Francisco, in the State of California, within thirty days from the date of this writ, pursuant to a writ of error filed in the clerk's office of the District Court of the United States for the Western District of Washington,

Northern Division, wherein Charles L. Intermela and The American Surety Company, a corporation of the State of New York, are plaintiffs in error, and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Edward Douglas White, Chief Justice of the Supreme Court of the United States of America, this 24th day of April, A. D. 1912, and of the independence of the United States the one hundred and thirty-sixth.

(Seal)

C. H. HANFORD,
United States District Judge.

Attest: A. W. ENGLE, Clerk.

F. A. SIMPKINS, Deputy.

I hereby, this 24th day of April, 1912, accept due personal service of this citation on behalf of David Perkins, defendant in error, and J. A. Bentley.

CHARLES E. SHEPARD,
One of the Attorneys for said Defendant in Error.

Indorsed: No. 1931. In the District Court of the United States for the Western District of Washington, Northern Division. David Perkins vs. Charles L. Intermela and the American Surety Company. Citation. Filed in the U. S. District Court, Western Dist. of Washington, April 24, 1912. A. W. Engle, Clerk, by S., Deputy.

5

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

CHARLES L. INTERMELA and AMERICAN
SURETY COMPANY, (Defendants),

Plaintiffs in Error,

—vs.—

DAVID PERKINS (Plaintiff),

Defendant in Error.

No.

BRIEF OF PLAINTIFFS IN ERROR

U. D. GNAGEY,

Attorney for Plaintiffs in Error.

L. B. STEADMAN,

Of Counsel for Plaintiffs in Error.

Upon Writ of Error to the United States District Court for the
Western District of Washington
Northern Division

STATEMENT OF CASE.

This is an action at law brought by the defendant in error, David Perkins, as plaintiff below against the plaintiffs in error, Charles L. Intermela and the American Surety Company.

As the record frequently refers to the parties as plaintiff and defendants as they appear in the lower court, the parties will be designated in this brief as they appear in the pleadings in the lower court, unless they are expressly designated as plaintiffs in error or defendant in error as the case may be.

Charles L. Intermela, one of the defendants, was during certain times mentioned in the complaint, treasurer of the City of Port Townsend, Washington, and the other defendant, American Surety Company, was surety on his official bond as such treasurer. The plaintiff is the holder of a certain warrant of the City of Port Townsend, drawn on the Indebtedness Fund of said city, the face value of which is \$1548.12. This action was brought against the said treasurer and his surety for failure to pay the said warrant when it was presented on December 1, 1910, the plaintiff claiming that at that time he had sufficient funds on hand to pay the same, and that long prior thereto it became the duty of the said treasurer to pay it, and that he refused to make such payment.

After making a motion to make the complaint more definite and certain in regard to the general allegation that long prior to December 1, 1910, it became the duty of the said treasurer to pay said warrant, and

also to make the said complaint more definite and certain in other respects, and the denial of the said motion by the court, the defendants answered, admitting all the allegations of the complaint from the beginning down to and including the copy of the bond as set out in said complaint (Transcript, p. 4), and denying each and every other allegation of the complaint. Thus, the defendants, by their answer, denied among other allegations the allegation that the treasurer had at any time sufficient funds on hand to pay the said warrant, and the allegation that at any time it became the duty of said treasurer to pay the same. This answer also sets up three affirmative defenses (Transcript, pp. 11 to 36). The answer is very long because it sets up a long complaint in a former action which resulted in the judgment in satisfaction of which the warrant in suit was issued.

The first of these defenses challenges the jurisdiction of the court in such former suit to render the judgment it did render on the cause of action therein attempted to be set forth, and also challenges the legality of the warrant on the ground that it was not ordered at a regular meeting of the council as required by law.

The second affirmative defense interposes the statute of limitations.

The third affirmative defense sets forth in full the circumstances under which the warrant in suit was issued, raises the constitutional limit of indebtedness, and sets forth a state of facts which defendants claim shows

that the warrant was issued in fraud of the taxpayers of said city.

The plaintiff replied, denying some of the matters set up in these affirmative defenses, and thus the issues were made up.

Broadly and generally speaking, the issues in the case are as follows:

1. Whether at the time mentioned in the complaint or at all, it was the duty of the city treasurer to pay the said warrant, that is, the warrant in suit.

2. Whether on December 1, 1910, the time the warrant was presented for payment the last time, the said treasurer had sufficient funds on hand applicable to the payment of said warrant to pay the same.

3. Whether plaintiff's warrant is a legal obligation against the city, and such a warrant as the city treasurer would under any circumstances be compelled to pay.

The warrant in suit arose as follows: On October 15, 1888, the City of Port Townsend, Washington, entered into an agreement, pursuant to law and the ordinances of the city, with one W. C. Williams for the grading of a certain portion of Washington street in said city of Port Townsend, and agreed to pay said Williams for the said grading in warrants drawn on the Washington Street Improvement Fund. The grading was done under said contract, and in payment of said work, among others, a warrant for the sum of \$1000 was drawn on said fund on February 11, 1889, and delivered to said Williams. Nothing was paid on

this warrant except the interest on the same to August 12, 1892.

Thereafter Alonzo Elliott became the owner of the warrant and on August 19, 1897, he commenced suit in the Superior Court of the State of Washington for Jefferson County against the City of Port Townsend on the same. The city interposed a demurrer to the complaint in the action and such demurrer was overruled by the court, and the defendant electing to stand upon its demurrer and refusing to plead further, a judgment against it in favor of the plaintiff, Alonzo Elliott, in the sum of \$1523.42 and costs of suit was rendered and entered on November 16, 1897. The judgment was made to bear ten per cent interest, the same interest the street grade warrant bore. The complaint in this action is set out in full in defendants' first affirmative defense (Transcript, pp. 12 to 32). The warrant sued on in this case of Alonzo Elliott against the city was drawn on the Washington Street Improvement Fund. In other words, it was, as the record plainly shows, what is familiarly known as a street grade warrant. The grading contract and the ordinances under which it was made, and also the ordinances under which the grading was done and also those under which the special assessments were made, are all fully set out in this complaint, a true copy of which is contained in the answer in this case as stated before.

The Supreme Court of the State of Washington, on July 9, 1897, in the case of *The German American*

Savings Bank vs. The City of Spokane, 17 Wash. 315, decided that under no circumstances can a city be held liable on a street grade warrant.

The City of Port Townsend duly appealed from the judgment rendered against it in the said case of *Alonso Elliott vs. The City of Port Townsend*, by serving and filing a notice of appeal on February 14, 1898, but before anything further was done in the matter of the appeal, the city council abandoned the same, and agreed to issue and did issue a warrant drawn on the Indebtedness Fund of said city in satisfaction of the judgment appealed from, and the warrant so issued is the warrant involved in this suit.

At the same time the city council issued this warrant, they also issued other warrants drawn on the Indebtedness Fund in a large amount in satisfaction of other judgments obtained against the city by other street grade warrant holders. These judgments in satisfaction of which all these warrants were issued on the Indebtedness Fund were never carried to the Supreme Court of the state, and in this way about \$100,000 in warrants, face value, were issued on such Indebtedness Fund.

The record also shows that the assessed valuation of the City of Port Townsend for the year 1897 was \$1,541,426, and for the year 1898, \$1,532,056, and that before the issuing of the same and excluding all of them, and excluding the street grade warrants, which according to former decisions were not to be included in calculating the indebtedness of the city, the City of

Port Townsend was already indebted beyond its constitutional limitations, based on the above valuations.

All the street improvement funds were raised by special assessments levied on the property abutting on the street improvements, according to law and the ordinances of the city. The Indebtedness Fund of the city was created by the act of the legislature of 1897, and according to its express provisions, took effect February 1, 1898. This Indebtedness Fund may be supplied by general taxation, and certain moneys coming from certain delinquent taxes were also to be placed in this fund. That part of the act which is necessary to a decision of this case will be set forth in full hereafter.

It will thus be seen that by the process of obtaining judgments on these street grade warrants and satisfying these judgments by warrants issued on the Indebtedness Fund of said city, street grade warrants which were not a liability against the city as such were converted into an indebtedness against the city on the face of the record.

A stipulation was signed by the parties and placed on file waiving a jury (Transcript, p. 43) and the cause was tried by the court without a jury. When the cause was submitted to the court for decision, defendants requested that special findings be made and in compliance with such request the court made such special findings.

Defendants proposed special findings, and the court

afterwards in the absence of the defendants made and signed findings and the judgment. Defendants, deeming that the findings made by the court did not cover all the issues in the case, made a motion to revise the same. Upon the hearing of such motion the court denied the same generally, but modified the fifth finding and made the same read as it appears in the record on pages 65 and 66.

SPECIFICATIONS OF ERROR.

I. The court erred in overruling defendants' objection to the jurisdiction of the court on the ground that the amount in controversy, exclusive of interest and costs, is less than two thousand dollars, and erred in finding that the amount in dispute exclusive of interest and costs exceeds the sum of two thousand dollars. (Assignment of errors Nos. 2 and 11, Record, pp. 115, 117.)

II. The court erred in admitting in evidence the duplicate receipts filed with the city clerk by the city treasurer. These receipts are for money received by the city treasurer from the county treasurer on account of sales of county real estate. One of these receipts was read in evidence and is as follows:

"Received from H. A. Hart, county treasurer, the sum of eight hundred fifty-one and 23-100ths (\$851.23) for said city, for city's portion account of sales collected, in December, 1908; (Signed). January 11, 1909." (Transcript, pp. 100-101.)

The other receipts all showed the receipt of money

from the same source and were offered and read in evidence by giving the date and the amount of the receipt. (Transcript, p. 106.)

Defendants objected to the introduction of these receipts generally and on the specific ground that they do not show the receipt of money belonging to the Indebtedness Fund. (Bill of Exceptions, Record, pp. 105-6; Assignment of Errors No. 3, Record, p. 115.)

III. The court erred in admitting in evidence certain letters of the county treasurer written to the city treasurer in connection with remittances of money. These letters show the receipt of moneys from the same source, together with other moneys, as that shown by the duplicate receipts. One of the letters was read in evidence and is as follows:

"Office of the County Treasurer, Jefferson County, Port Townsend, Washington, January 11, 1909: Hon. C. L. Intermela, City Treasurer. Dear Sir: Herewith enclosed I beg to hand you my official check No. 2056, Merchants' Bank of Port Townsend, Washington, payable to your order for the sum of (\$2784.63) Two Thousand, seven hundred eight-four dollars and sixty-three cents, being in full amount collected by me and due the City of Port Townsend, Washington, in the month of December, 1908, as follows:

From sales of county real estate, lands and premises	\$ 851.23
From year 1904 tax rolls96
From year 1905 tax rolls	1.44
1906 tax rolls	8.44
1907 tax rolls	1922.86
Total	<u>\$2784.63</u>

Please acknowledge this remittance as usual and oblige,
Yours truly,

(Signed) HARRY A. HART,
Treasurer of Jefferson County, Washington."

(Bill of Exceptions, Record, pp. 102-3).

The other letters were of the same nature, and only that portion of them designating the amount received from the sales of county property together with the date of the letters was read in evidence. (Record, p. 103, Bill of Exceptions.)

These letters so far as the proceeds of the sale of county property is concerned, cover practically the same remittances as the receipts introduced.

The defendants objected to the introduction of these letters generally and on the specific ground that they do not show the receipt of any money belonging to the Indebtedness Fund. This ruling is assigned as error. (Assignment of Errors No. 4, Transcript, p. 116.)

IV. The court erred in denying defendants' motion for a non-suit. This motion was made on two specific grounds, as follows:

(a) On the ground that the plaintiff has not shown as alleged in his complaint, or at all, that it was the treasurer's duty to pay the warrant involved in the suit.

(b) On the ground that the plaintiff has not shown that on December 1, 1910, as alleged in his complaint, or at any time, the said treasurer had sufficient funds properly applicable to the payment of said war-

rant to pay the same. (Bill of Exceptions, Transcript, p. 107; Assignment of Errors Nos. 6 and 7, Transcript, p. 117.)

Both of these motions were repeated at the close of all the testimony and were again denied by the court, and an exception taken by defendants. (Bill of Exceptions, Transcript, p. 112.)

At the close of all the testimony on the motion for non-suit, the court had before it the additional fact as admitted by the parties on the trial of the cause that the council never made an order directing the treasurer to pay this warrant. (Bill of Exceptions, Record, p. 112.)

Defendants asked the court to make such finding in accordance with the admission of the parties, but the court refused to so find. (Defendants' Proposed Finding No. 13, Record, p. 58; Assignment of Errors No. 20, Record, p. 121.)

V. The court erred in denying defendants' motion at the close of plaintiff's testimony for a dismissal of the case as to the bonding company on the ground that no default of the treasurer has been shown upon which the bonding company could possibly be held liable. (Bill of Exceptions, p. 107; Assignments of Errors No. 8, p. 117.)

VI. The court erred in finding (first part of third finding, Record, p. 60) that the action brought by Alonzo Elliott against the City of Port Townsend on the

19th day of August, 1897, in the Superior Court of the State of Washington for the County of Jefferson, being cause No. 1784, of said court, was "an action for damages for breach of contract" without specifically stating that said suit was on a street grade warrant drawn on a special fund of a local improvement district in said city. (Assignment of Errors No. 12, Record, pp. 117-8.)

And in holding that the Superior Court in said case had jurisdiction to render the judgment it did render on the cause of action set forth in the complaint in said action. (Assignment of Errors No. 22, Record, p. 121.)

VII. The court erred in making that portion of the fourth finding (Transcript, p. 61) in which it is found that the regular meeting of the city council, held on February 15th, 1898, continued its sessions upon the two succeeding days; and in refusing to make the 6th, 7th and 8th findings proposed by the defendants, which read as follows:

"6. That at that time and at all times herein mentioned Ordinance No. 585 of said city was in force, which said ordinance provided that the regular meetings of the city council of said city shall be held on the first and third Tuesdays of each month.

"7. That on February 15, 1898, that being the third Tuesday in said month, the said city council held a regular meeting, and then took a recess till February 16, 1898, at three o'clock p. m., without stating for what purpose said recess was taken.

"8. That on the following day, February 16, 1898, the said city council met at three o'clock p. m.,

after the expiration of said recess, and after passing a resolution with reference to certain judgments that had been recently obtained against the city on street grade warrants, took a further recess till four o'clock p. m., of the following day; and at four o'clock p. m., of the following day, that is February 17, 1898, the said city council again met and ordered the issuing of the warrant sued on herein." (Findings 6, 7 and 8 proposed by defendants, Transcript, p. 54; Assignment of Errors Nos. 13, 15, 16 and 17, Transcript, p. 118.)

And in refusing to hold that the warrant in suit is void because issued at an adjourned meeting of the city council and not at a regular meeting of said council, as required by law.

VIII. The court erred in refusing to make the 10th, (second finding marked "10"), 11th and 12th findings proposed by defendants, as set forth in their proposed findings on pages 55, 56 and 57 of the record. The refusal to make these findings and each of them is assigned as error. (Record, pp. 119 and 120; Assignment of Errors, Nos. 17, 18 and 19.)

These three proposed findings are the same as paragraphs 2, 3 and 4 of the third affirmative defense. They show generally under what circumstances the warrant in suit was issued.

IX. The court erred in not holding that the said warrant was one of a series of warrants all of which were over-issued, that is, issued when the city was beyond its constitutional debt limit. (Assignment of Errors No. 24, Record, p. 122.)

X. The court erred in not holding that the war-

rant in suit was issued under such circumstances and at such a time as to make it a fraud against the City of Port Townsend and against the taxpayers of said city, as a matter of law. (Assignment of Errors Nos. 21 and 25, Record, pp. 121 and 122.)

XI. The court erred in not giving judgment in favor of the defendants (on the findings). (Assignment of Errors No. 26, Record, p. 122.)

ARGUMENT.

I. Jurisdictional Amount.

The District Court (formerly Circuit) has jurisdiction where "the matter in dispute exceeds, exclusive of interest and costs, the sum or value of Two Thousand Dollars."

Revised St. 629, Act of March 3rd, 1875, as amended in 1887 and 1888.

The object of this action is simply to recover the amount of a warrant the face value of which is \$1548.12.

Edwards vs. Bates County, 163 U. S. 269.

Auer vs. Lumbert, 19 C. C. A. 72 and note p. 79.

Howard vs. Bates County, 43 Fed. 276.

II. Motion for non-suit.

This motion was made at the close of plaintiff's testimony and again at the close of all the testimony.

The objection to the introduction of certain writ-

ten evidence consisting of the duplicate receipts of the city treasurer in the city clerk's office, and the letters from the county treasurer to the city treasurer accompanying the remittances of certain moneys may be considered in connection with this motion. The particular ground of the objection to the introduction of this evidence was that the receipts and letters do not show any moneys belonging to the Indebtedness Fund of the city and the motion for non-suit was made on the ground that they have not shown that there was any money in this fund to pay the warrant. And also that they have not shown that at any time it was the duty of the city treasurer to pay such warrant.

In order that plaintiff may recover he must prove a breach of the condition of the bond where such breach is denied as in this case and the burden of proof is upon him.

29th Cyc. 1468.

Aultman Taylor Machinery Company vs. Burchett, 83 Pac. 719 (Okl.).

Board of Supervisors vs. Lovejoy, 107 N. W. 276 (Mich.).

Plaintiff's warrant was drawn on the Indebtedness Fund and he attempts to show that defendant treasurer had sufficient funds in his possession on December 1st, 1910, belonging to this fund to pay the same.

The evidence introduced shows that between January, 1910, and December 1st, 1910, he received a cer-

tain amount of money as the city's share of the proceeds of the sale of county realty forfeited to the county for taxes amounting to more than the amount of this warrant. Was this evidence competent to show the receipt of money belonging to the Indebtedness Fund?

The Indebtedness Fund was created by an act of the legislature of 1897 to take effect February 1st, 1898. That portion of the law which shows what moneys shall go into this fund besides the levy especially made for such fund by the city, if any, is as follows:

"Sec. 7. All moneys collected on and after the first day of February, 1898, from taxes of the year 1896, and previous years, and from penalty and interest thereon, shall be paid into the indebtedness fund."

Laws of 1897, p. 223, R. & B. Code, Sec. 5135.

If plaintiff has a legal warrant the issuing of it on the Indebtedness Fund and the acceptance of the same by his assignor amount to an agreement that it shall be paid out of this fund and no other, and the treasurer under no circumstances could be held liable for refusing to pay it out of any other fund.

It might be questioned in the first place whether moneys coming from the sale of county property forfeited to the county for taxes is under the law of Washington a collection of a tax, but taking it for granted that it is for the purpose of this argument, plaintiff has not shown that the property forfeited to the county for taxes from the sale of which

this money was derived was so forfeited for the taxes for the year 1896 or for any previous years, and hence he has not shown the receipt of any money belonging to the Indebtedness Fund by the evidence introduced. It would have been an easy matter for the plaintiff to show from the records of the county where this money came from, whether from property that had been forfeited for delinquent taxes of 1896 or previous years or for delinquent taxes for subsequent years. If it was forfeited for delinquent taxes of years subsequent to the year 1896, it did not under the law just quoted belong to the Indebtedness Fund.

The warrant is not due until there is sufficient money in the fund on which it is drawn to pay it.

Savings Bank and Trust Company vs. Gelbach,
8 Wash. 499.

Potter vs. New Whatcom, 20 Wash. 589.

A plaintiff cannot under any circumstances recover until he has shown that his warrant was due and payable and that the treasurer refused to pay it when as a matter of law he was compelled to so pay.

"To entitle the creditor in such a case (holder of warrant drawn on special fund) to remedy by action or mandamus, it is necessary for the plaintiff to allege and prove affirmatively that there is money in the fund."

Dillon Mun. Cor., Sec. 854 (5th Ed.).

The plaintiff, however, tried to show that this money belonged to the Indebtedness Fund by introducing in evidence Section 9 of Ordinance No. 722, an

ordinance defining the duties of the city treasurer. This ordinance was passed December 4th, 1906, and the section introduced reads as follows:

Sec. 9. "It shall be the duty of the city treasurer to turn into the Indebtedness Fund all moneys received by the city from the County of Jefferson for its share of the proceeds of the sales of any county property, and all moneys from city taxes, penalties and interest, excepting moneys collected for the payment of any city bonds, and excepting the tax levies for the three preceding years which he shall segregate, immediately upon receipt, into the respective levies therefor, until all the legal outstanding claims against the "indebtedness fund" of the city shall have been paid, but the city treasurer shall pay no 'indebtedness fund' warrant, excepting the 'general expense,' 'fire and water,' 'light' and 'road' fund warrants without the special order of the city council."

Considering the last part of this section with the first, this section of the ordinance directs that all moneys coming from the sale of county real estate be placed in this fund, not absolutely, but only for a certain purpose; that is for the purpose of paying off certain warrants theretofore issued on certain funds therein designated. If the council had placed this money in this fund without instructions as to its use, it might be presumed that it belonged to this fund, but as they placed a restriction on its use, it is equivalent to placing it there for a certain purpose only.

Counsel for plaintiff who tried the action evidently went on the theory that the restriction as to the use of the money was wholly without authority of law and void and that he could disregard it.

If he would have shown that the money ordered to be placed in this fund by this section of the ordinance was money legally belonging to the Indebtedness Fund according to the law creating such fund, then as against the holder of a valid warrant on the fund, the restriction would not be legal, but in that event, the money would properly have been placed in the fund not because the council so ordered by ordinance but because the law so directed.

The plaintiff has not shown and has not even tried to show that the money the council directed to be placed in this fund was money coming from any of the sources from which this fund is replenished. The ordinance was passed in 1906. The council in this ordinance directed that the money coming from the sale of county property should be placed in this fund and placed a restriction on its use. After this lapse of time there is no presumption that any of this money came from property that was forfeited to the county for taxes for the year 1896 or previous years.

It must be borne in mind that this is an action against the treasurer and his surety for failure to pay the warrant and not against the city. It is a well established rule that a surety's liability depends upon the terms of his contract, that is, the bond that he executed.

29 Cyc. 1454.

A bond so far as it imposes a liability is construed strictly.

29 Cyc. 1454.

City of St. Louis vs. Sickles, Executrix, 52 Mo. 122.

The bond of defendant Intermela as treasurer is conditioned as follows: "Now, therefore, if the said Chas. L. Intermela shall faithfully perform all his duties as such treasurer of said City of Port Townsend according to law and city ordinances of said city * * *."

Plaintiff has not shown that the treasurer has violated any law or ordinance. In fact, this action was prosecuted because he obeyed the instructions contained in this ordinance, but plaintiff has not shown that the ordinance violates any law.

This argument is very much strengthened by the fact that while the warrants drawn on the particular funds mentioned in Section 9 of Ordinance No. 722 are made payable according to the terms of the law of 1897 out of the Indebtedness Fund thereby created, yet the Indebtedness Fund was not the only fund out of which the city could have been compelled to pay such warrants. They were drawn on those funds before the act of 1897 was passed, and any money that went into any of those funds by any law prior to the passage of the act of 1897 could have been subjected to the pay-

ment of such warrant. Hence the city being desirous of paying off these old warrants as soon as possible, placed in this fund for the purpose of paying such warrants, and no other, moneys which would not legally be subjected to the payment of plaintiff's warrant. In other words, plaintiff's warrant has an entirely different standing than the warrant drawn on funds mentioned in such Section 9; hence the fact that the city council ordered certain moneys to be placed in the Indebtedness Fund for the purpose of paying the latter warrant is no evidence whatever that that money could have been subjected to the payment of plaintiff's warrant.

State ex rel. Polson vs. Hardcastle, 68 Wash.

This will more clearly appear by a reference to the different laws. The law under which warrants drawn on the funds mentioned in Section 9 of Ordinance 72 were issued, is found in Sub-division 9 of Section 636 of Hill's Annotated Codes and Statutes, and Section 647, which are as follows:

"§ 636. The city council of such city have power,

...
 "9. To levy and collect annually, a property tax, which shall be apportioned as follows: *For the general fund, not exceeding sixty cents on each one hundred dollars; for street fund, not exceeding thirty cents on each one hundred dollars; and for sewer fund, not exceeding ten cents on each one hundred dollars.* The levy for all purposes for any one year shall not exceed one dollar on each one hundred dollars of the assessed value of all real and personal property within such city."

"§ 647. Nothing in this chapter contained shall be construed to prevent any city having a bonded indebtedness, contracted under laws heretofore passed, from levying and collecting such taxes for the payment of such indebtedness, and the interest thereon, as are provided for in such laws, in addition to the taxes herein authorized to be levied and collected. *All moneys received from licenses, street poll-tax, and from fines, penalties, and forfeitures, shall be paid into the general fund.*"

Sections 1, 2, 3 and 7 of the Act of 1897, creating the indebtedness fund, are as follows:

"Section 1. In all municipal corporations, having less than twenty thousand inhabitants, there shall be maintained a fund to be designated as 'current expense fund,' and, after the first day of February, eighteen hundred and ninety-eight, a fund to be designated as 'indebtedness fund.'

"Sec. 2. All moneys collected by such corporations from licenses for the sale of intoxicating liquors and from all other licenses shall be credited and applied by the treasurer to said 'current expense fund': *Provided*, that this act shall not exempt such corporations from paying ten per cent of all money collected for liquor licenses, to the state.

"Sec. 3. Such municipal corporations shall levy and collect annually a property tax for the payment of current expenses, not exceeding ten mills on the dollar; *a tax for the payment of indebtedness (if any indebtedness exists) not exceeding six mills on the dollar*, and all moneys collected from the taxes levied for payment of current expenses shall be credited and applied by the treasurer to 'current expense fund'; and all moneys collected from the taxes levied for payment of indebtedness shall be credited and applied to a fund to be designated as 'indebtedness fund.'

"Sec. 7. All moneys collected on and after the 1st day of February, 1898, from taxes of the year

1896 and previous years, and from penalty and interest thereon, shall be paid into the 'indebtedness fund.' "

III. The legality of the warrant in suit.

The defendants have attacked the legality of the warrant on a number of different grounds which may be specified as follows:

First: Because issued in satisfaction of a judgment against the city which was void for want of jurisdiction.

Second: Because the warrant was issued not at a regular meeting of the city council as required by law but at an adjourned meeting in violation of a positive statute.

Third: Because the warrant was one of a large number of warrants that was voluntarily over-issued, that is, issued when the constitutional debt limit had already been exceeded.

Fourth: Because the warrant was issued under such circumstances as shown by the record from which the court should have concluded that the same was issued without authority of law and in fraud of the taxpayers of the city.

First, as to the jurisdiction of the court in the case of *Alonzo Elliott vs. the City of Port Townsend*, to render the judgment in satisfaction of which the warrant in suit was issued.

Van Fleet, in defining jurisdiction, says:

"Jurisdiction is simply power. This is the definition given by Chief Justice Green, of New Jersey, and is the best I have seen. The Supreme Court of the United States first defined it to be "the power to hear and determine." After this definition had stood for nearly fifty years and been copied by every supreme court in the Union, a cause was discovered where the court had the power to hear and determine, and yet its judgment was void for want of jurisdiction; so that learned court felt constrained to qualify the earlier definition so as to make it "the power to hear and determine and give the judgment rendered." Collateral Attack, Sec. 58 (2nd ed.)

Van Fleet in the same section, after making the statement above quoted significantly says:

"It is possible that cases may arise showing that still other terms must be added to the last definition in order to give a complete conception of jurisdiction."

In *Newman vs. Bullock*, 23rd Colorado 23, the court says: "It is safe to say that the tendency of later authorities, especially in the Federal courts, is to enlarge the definition of jurisdiction to make it include not only the power to hear and determine but also the power to render the particular judgment in the particular case."

The following cases sustain the idea of jurisdiction of the subject matter that the court must have power not only to hear and determine and render a judgment but must have power to render the particular judgment on the particular cause of action set forth in the complaint.

In re Permstick, 3 Wash. 672.

State ex rel. Summerfield vs. Taylor, 14 Wash. 495.

The following are cases that sustain the same idea of jurisdiction and are cases where judgments have been attacked collaterally and held void:

State ex rel. Dodge vs. Langhorne, 12 Wash. 588.

Hatch vs. Ferguson, 68 Fed. 43.

Johnson vs. McKinnon, 54 Fla. 221.

Russell vs. Shartleff, 28 Colo. 414.

Kelly vs. Milan, 127 U. S. 139.

Ritchie vs. Sayres, 100 Fed. 520.

Ewing vs. Mallison, 65 Kans. 484.

Paul vs. Willis, 69 Tex. 261.

Granham vs. Mayor of San Jose, 24 Cal. 585.

Kane vs. Rock Rapids Ind. School Dist., 82 Iowa 5.

Canal Bank vs. Partee, 99 U. S. 325.

Love vs. Blair, 48 L. R. A. 257 (Kans.)

United States vs. Walker, 27 L. ed. 927 (U. S.)

Ex parte Lange, 18 Wall. 163.

Bigelow vs. Forest, 9 Wall. 339.

Windsor vs. McVeigh, 93 U. S. 274.

Freeman Judgment, Sec. 116 (4th Ed.)

Charleston vs. Beller, 45 W. Va. 44.

On July 9th, 1897, in the case of *German American Savings Bank vs. Spokane*, 17 Wash. 315, the

Supreme Court of the State of Washington in a very lengthy opinion and after considering the decisions in many different states in the Union, decided that in the State of Washington no city can be held liable on what is known as a street grade warrant and ever since then the court has firmly held to this doctrine and never allowed a recovery against any city on such warrants.

Wilson vs. Aberdeen, 19 Wash. 89.

Rhode Island Mortgage, Etc., Co. vs. Spokane,
19 Wash. 617.

Doxy vs. Port Townsend, 21 Wash. 707.

Northwestern Lumber Co. vs. Aberdeen, 22
Wash. 404.

Potter vs. Whatcom, 25 Wash. 207.

State ex rel. Security Sav. Soc. vs. Moss, 44
Wash. 91.

Soule vs. Ocosta, 49 Wash. 518.

Jurey vs. Seattle, 50 Wash. 272.

*State ex rel. American Freehold-Land Mort-
gage Co. vs. Tanner*, 45 Wash. 348.

The judgment in the case of *Alonso Elliott vs. The City of Port Townsend*, was entered on the 16th day of November, 1897, upon a complaint which shows clearly that the action was based upon a street grade warrant. (This complaint is set forth in full in defendant's answer, the record pages 12 to 35, and this copy of the complaint was agreed by counsel for the parties to this suit to be a true copy of the complaint

in said action, and that the said complaint might be omitted from the exhibit introduced in evidence and this stipulation by the parties was approved by the court, bill of exceptions, record page 106.)

It will thus be seen that at the time the judgment in satisfaction of which the warrant in suit was rendered it was a settled law of Washington that no city is liable on a street grade warrant and that said judgment was based upon said street grade warrant.

Before considering the second point which defendants claim made the warrant in suit illegal a few preliminary rules or doctrines in relation to municipal corporations should be noticed as follows:

A municipal corporation may make the same defense against any holder of a warrant that might have been interposed against the person to whom the warrant was originally issued. In other words, a warrant is not a negotiable instrument in the full sense of the term. There is no such thing as an innocent holder of such a warrant.

State ex rel. Olympia National Bank vs. Lewis,
62 Wash. 266. (20 Wash. Dec. 45, March 8,
1911.)

Clark vs. Polk Company, 19 Iowa 248.

Clark vs. The City of Des Moines, 19 Iowa 199.

“A municipal corporation is not estopped after a warrant upon its treasurer has been issued to set up the defense of *ultra vires*, or fraud or want or failure of consideration.”

Dillon Municipal Corporation, 857 5th Ed.

Thomas vs. Richmond, 12th Wall. 349.

A municipal corporation has only such powers as are expressly granted and such incidental ones as are necessary to make those powers available, and all of these powers are strictly construed. 2 Kent Com. 298.

Clark vs. City of Des Moines, 19 Iowa 199 (212).

City of Fort Scott vs. W. G. Eads Brokerage Co., 54 C. C. A. 437; 117 Fed. 51.

When the statute provides that a power granted shall be exercised in a certain way the manner of exercising it is exclusive.

City of Fort Scott vs. W. G. Eads Brokerage Co., 54 C. C. A. 437; 117 Fed. 51 (212).

One dealing with a municipal corporation is compelled at his peril to take notice of the powers of such corporation.

20 *Am. & Eng. Ency.* 1183.

The National courts will follow the decisions of the highest state tribunals in all matters of local law.

Willis vs. The Board of Com'rs., 30 C. C. A. 445 and note.

Claiborne vs. Brooks, 111 U. S. 410.

Livingston vs. Moore, 7 Pet, 469 (542).

In the same way the Federal courts will follow state decisions as to the weight of adjudications.

Wilson vs. Parren, 11 C. C. A., note p. 81.

And the Federal courts will also follow the latest adjudication of the State courts.

Wilson vs. Parren, 11 C. C. A., note p. 82.

Douglas vs. Pike Co., 101 U. S. 677. (See again.)

The warrant in suit was issued at an adjourned meeting of the city council.

Plaintiff's evidence shows that the city council met on February 15, 1898, that they adjourned at that meeting to February 16, 1898, without stating the purpose of their adjournment, and that on the 16th of February they met pursuant to adjournment and again adjourned until the 17th, and that then on the 17th they issued the warrant in suit. The defendants introduced Ordinance No. 585 of the City of Port Townsend, defendants Exhibit 2, which shows that the regular meetings of the city council were held on the first and third Tuesdays of each month. The 15th of the month of February, 1898, was the third Tuesday. It thus appears that the warrant was ordered at an adjournment of an adjourned meeting. The defendants asked the court to find in accordance with this evidence in their sixth, seventh and eighth proposed findings, but the court refused to make these findings and instead made a finding as follows:

"That a regular meeting of the city council of the city of Port Townsend convened on February 15, 1898, and continued its session on the two succeeding days; that at said meeting the city council agreed with Alonzo Elliott, the plaintiff in whose favor said judgment was rendered, that he should receive a warrant against the indebtedness fund of the city for the amount of his judgment, which warrant should bear interest at the rate of six per cent per annum instead of ten per cent, specified in the judgment of the court." (First part of fourth finding made by court, Record p 61.)

The law that was in force at that time regarding the meetings of the city council and that is in force now, is embodied in section 7681 of R. and B. Code and reads as follows:

7681 (934) Meetings of Council.

The city council, together with the mayor, shall meet on the first Tuesday in January, next succeeding the date of said general municipal election, shall take the oath of office, and shall hold regular meetings at least once in each month, but not to exceed one regular meeting in each week, at such times as they shall fix by ordinance. Special meetings may be called at any time by the mayor by written notice delivered to each member at least three hours before the time specified for the proposed meeting: Provided, however, that no ordinance shall be passed, or contract let, or entered into, or bill for the payment of money allowed, at such special meeting, or at any adjourned regular or special meeting. All meetings of the city council shall be held within the corporate limits of the city at such

place as may be designated by ordinance, and shall be public. (L. '90, p. 181, § 113; 1 H. C., § 632; L. '93, p. 158, § 3.)

If the court's finding on the question of the meetings that the council continued its sessions upon two succeeding days be interpreted that they adjourned from day to day, we have no fault to find with the finding, except that it does not state that they adjourned from the 15th, the regular meeting, without stating the purpose of their adjournment. If, however, the finding really means that they met on the 15th and remained in session for the 15th and the two successive days continually, without adjournment, the finding is absolutely contrary to the evidence introduced by the plaintiff himself. (See Plaintiff's exhibit "C," Record pp. 74 to 77, inclusive.)

The law just quoted expressly prohibits the city council from placing the city under any financial obligation at an adjourned meeting of the council. The issuing of this warrant is a direct violation of this law and the city council had no power whatever to in any way create or consummate legal financial obligations at such adjourned meeting.

20 *Am. & Eng. Ency.* 1162.

City of Fort Scott vs. W. G. Eads Brokerage Co., 54 C. C. A. 437.

The object of the law no doubt is to make the city council do their work so far as financial obligations against the city are concerned at regular meet-

ings and in public, that is, at times definitely fixed by ordinance, so that the taxpayers may know what their agents are doing.

If any evidence of the wisdom of this provision is needed, it is found in this very case. Records that they have introduced here, Plaintiff's Exhibits "A," "B" and "C," show that the council at this adjourned meeting of an adjourned meeting attempted to settle upon the city an indebtedness of over sixty-five thousand dollars, all on claims which the Supreme Court of the state had definitely and expressly decided are not a liability against the city. The lower court in its memorandum decision on the merits, record page 49, says:

"By the record, however, it appears that said resolution was adopted at an adjourned session of a regular meeting and not at a special or called meeting of the council."

It will be noticed that an adjourned meeting is within the express prohibition of the statute. The court then continued:

"Moreover, if the council had not passed the resolution its failure to act at a regular meeting could not affect the validity of the warrant, because the city officials could have been compelled by a writ of mandamus to issue a warrant to satisfy the judgment, therefore, the act of the mayor and the city clerk in issuing the warrant was not unauthorized and the warrant is not void."

It appears, however, from the record that the defendant city had taken an appeal from this judgment

by serving and filing with the clerk of the court a notice of appeal. There was some contention in the lower court that the appeal had not been taken in time, and had not been perfected by the filing of a bond or by the making of a deposit. These contentions are without merit. The notice of appeal, Defendants' Exhibit 1, record page 88, was duly served on the 14th day of February, 1898, and filed with the clerk of the court, all within ninety days after the entry or filing of the judgment on November 16, 1897. This perfected the appeal and it was not necessary for the city to give a bond. The last part of section 1721 of Rem. & Bal. Code, providing for bond for costs on appeal is as follows:

"But no bond or deposit shall be required when the appeal is taken by the state or by a county, city, town or school district thereof, or by a defendant in a criminal action."

In this way the appeal was not only perfected but such appeal operated as a supersedeas and absolutely stayed all proceedings until such appeal was determined.

Campbell vs. Hall, 28 Wash. 626.

Jordon vs. Seattle, 29 Wash. 581.

At the time the city council issued this warrant then the judgment creditor had no right whatever to proceed against the city either by mandamus or otherwise to compel the payment of this judgment or to compel the issuing of a warrant in satisfaction thereof. In other words, the action of the council in issuing this

warrant at an adjourned meeting of an adjourned meeting was purely voluntary on their part.

Campbell vs. Hall, 28 Wash. 626.

Jordon vs. Seattle, 29 Wash. 581.

The 8th, 9th and 10th specifications of errors may all be considered together. Defendants assigned as error the refusal of the court to make the 10th (2nd finding, marked 10), 11th and 12th findings proposed by defendants as set forth in their proposed findings on pages 55, 56 and 57 of the record. These three proposed findings are about the same as paragraphs 2, 3 and 4 of the defendants' third affirmative defense, as set forth in their answer on pages 33, 34 and 35 of the record. The reply of the plaintiff to this third affirmative defense denied in part only the allegations of these paragraphs, but all the allegations of these paragraphs denied by plaintiff in his reply were fully proved on the trial so that the court should have made the findings in accordance with the allegations of the affirmative defense. To specify: plaintiff in his reply denied that the city of Port Townsend duly appealed from the judgment rendered against it in the case of *Alonzo Elliott vs. The City of Port Townsend*, and points out two specific defects in the taking of the appeal. The first of these alleged defects was that the city did not give a proper bond, but we have heretofore shown that a municipal corporation in the state of Washington is exempt from giving a bond upon taking an appeal. The second defect mentioned was that the appeal was not taken

within the time required by law, that is not within ninety days after the entry of the judgment. This alleged defect is based on the fact that the judgment in the Elliott case was signed on the 14th day of November, and filed on the 16th day of November, 1897, the notice of appeal was not served until the 14th day of February, 1898, and the plaintiff considered that the appeal should have been taken within ninety days after the signing of the judgment, on November 14th.

According to the decisions of the Supreme Court of the state, however, the time within which an appeal may be taken runs from the date of the filing of the judgment with the clerk, which in this case was November 16th, 1897, and hence an appeal taken on the 14th of February, 1898, was within the ninety days.

National Christian Association vs. Simpson, 21 Wash. 16 (18).

Quarrel vs. Seattle, 26 Wash. 226.

According to these decisions then the appeal was properly taken and within the time required by law.

The plaintiff also denied that portion of defendants' third affirmative defense in regard to the agreement between the city of Port Townsend and Alonzo Elliott and denied that the said city entered into any such agreement therein alleged with Alonzo Elliott. The agreement alleged in said defense was that all the street grade warrant holders including the holder

of the warrant reduced to judgment in said cause of Alonzo Elliott against the city, agreed that the city would not defend actions brought on such street grade warrants nor appeal from the judgments that had been rendered on such warrants, nor in any wise resist payment of such judgments, but would satisfy all of such judgments so acquired and rendered including the judgment in said cause of Alonzo Elliott against the city by issuing warrants bearing six per cent interest on the indebtedness fund of said city.

The evidence introduced by plaintiff, Plaintiff's Exhibits "A," "B" and "C," clearly shows that such agreement was made by Alonzo Elliott, through his attorneys, and that acting upon such agreement the city actually did issue him a warrant on the indebtedness fund of said city in satisfaction of said judgment.

The issuing of the warrant to Alonzo Elliott was in itself an abandonment of the appeal.

Campbell vs. Hall, 28 Wash. 626.

Jordon vs. Seattle, 29 Wash. 581.

Considering that they proved all the allegations contained in this third affirmative defense that were denied by plaintiff, and the other allegations standing undenied, the defendants asked that the court make findings in accordance with the allegations of said affirmative defense, and the court's refusal to make such findings is assigned as error.

The undenied allegations of the Third Affirmative Defense, together with the evidence adduced on

the trial, show that the warrant in suit was issued in fraud of the taxpayers of the city, and without authority of law.

State ex rel. American, Etc., Mort. Co. vs. Tanner, 45 Wash. 348.

Kane vs. Independent School District, 47 N. W. 1076.

Marksburg, Etc., vs. Taylor, 10 Bush (Ky.) 519 (523).

The case of *State ex rel. American, Etc., Mort. Co. vs. Tanner*, 45 Wash. 348, was a Port Townsend case, and involved warrants belonging to the same series as plaintiff's warrant; the only difference is that the warrants involved in that case were issued on the indebtedness fund of the city in satisfaction of judgments that had been obtained by default on street grade warrants. A default judgment, however, is as binding as any other. (*Howard vs. City of Huron*, 60 N. W. 803).

The findings do not support the judgment. According to the Fifth Finding made by the court the only money shown to have been received by defendant treasurer was money coming from the proceeds of the sale of county property, but this, as we already have pointed out, is not showing that he had money properly applicable to the payment of this warrant.

Again, this same Fifth Finding sets forth Section 9 of Ordinance No. 722, an ordinance defining the duties of the City Treasurer. This section does not show, nor does anything else in the findings show,

that at any time it was the duty of the treasurer to pay this warrant.

Defendants asked the court to make a finding embodying this section of the ordinance, with the added finding that the council never made an order directing the treasurer to pay this warrant. (Proposed Finding No. 13, Record page 58, Assignment of Errors No. 20, Record page 121). This, however, was expressly admitted by the parties on the trial of the cause. (Bill of Exceptions, Record page 112), and if the court considers it of importance, we desire to urge that such finding should have been made.

Respectfully submitted,

U. D. GNAGEY,

Attorney for Plaintiffs in Error.

L. B. STEADMAN,

Of Counsel for Plaintiffs in Error.

6

IN THE
UNITED STATES
CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

CHARLES L. INTERMELA and
AMERICAN SURETY COM-
PANY,

Plaintiffs in Error.

vs.

DAVID PERKINS,

Defendant in Error.

No. 21574.

Brief for Defendant in Error

*Upon Writ of Error in Behalf of the Defendant
Below to the United States District Court for
the Northern Division of the Western
District of Washington.*

STATEMENT OF THE FACTS.

The District Court for the Western District of Washington, sitting in the Northern Division thereof, gave judgment at law against the defendants,

Intermela and American Surety Company, for \$2,933.84 and costs. The defendants have brought the case by writ of error in due form to this court.

The pertinent facts are these:

Ever since November 28, 1883, the City of Port Townsend has been a municipal corporation of Washington—first, till August 16, 1896, under a special act of incorporation, and since then under a general act which classified cities by their population—this one being under 20,000 population and of the third class. On October 15, 1888, pursuant to the charter and city ordinances providing for street improvements and special assessments to pay their cost, the city let a contract for grading its “Washington Street,” and agreed to pay for it by special warrants on the “Washington Street Improvement Fund.” (Transcript of Record, pp. 12, 13, 21-27.)

The work was done and the warrants issued, among which was one of February 11, 1889, for \$1,000 by which besides charging that sum to the fund the city also guaranteed its payment with ten per cent interest payable semi-annually. The warrant was presented for payment and indorsed, “Not payable for want of funds,” on Feb. 14, 1889. (Transcript, p. 27.)

The city took no steps to enforce payment of the assessments on the land in the “improvement district” (Transcript, pp. 28-9); and on August 12,

1897, Alonzo Elliott, the then holder of said warrant, sued the city on the grounds of failure to collect the assessments and to meet its guaranty, on the faith of which the contract was performed. (Transcript, pp. 12-32.)

To this complaint the city put in a demurrer, after the overruling of which it stood on its demurrer, and judgment ensued, signed in open court, on November 14, 1897, but indorsed, "Filed this 16th day of Nov., 1897." (Transcript, pp. 38-40, 86-7.)

The city took an appeal to the Supreme Court of Washington on the ninetieth (the last) day from November 16, but two days too late counting from November 14—the date of the actual signing of the judgment. (Transcript, p. 88.) Immediately afterwards, however, the city entered on negotiations with Mr. Elliott and other judgment creditors on similar warrants, in consequence of which the city waived its appeals, issued general warrants, and received satisfactions of the judgments. (Transcript, pp. 70-77.) The warrant in suit is at page 4.

This settlement was brought about by proceedings of the city council held on February 15, 16 and 17, 1898 (Transcript, pp. 72-77, and 95-100); but the city contests their legality on the ground that the council could exercise its power to allow bills only at its regular meetings which by its Ordinance

No. 585 were to be held only on the first and third Tuesdays of each month; whereas the third Tuesday of February, 1898, was the 15th day of that month, and the proceedings of the city council were carried over by "recess" adjournments to the 16th and 17th days, and the actual agreement to settle was not closed till the 17th. The settlement involved a reduction of interest from ten per cent to six per cent. (Transcript, pp. 54, 55, 90, 95-100.)

By virtue of that compromise, the judgment for Elliott was satisfied and a warrant to him on the "Indebtedness Fund" was drawn on February 18, 1898, for \$1,548.12 with six per cent annual interest and the next day was presented to the city treasurer and by him stamped "Not paid for want of funds." (Transcript, pp. 4, 5.)

This action was brought on December 19, 1910, by David Perkins, a citizen of Massachusetts, and assignee of Alonzo Elliott, the warrant-payee, who was a citizen of New Hampshire, against the city treasurer and the surety on his official bond, to recover damages against both on the ground of a breach of his bond by refusal to pay the warrant and interest on demand on December 1, 1910, when he had money in the indebtedness fund sufficient to pay it. (Transcript, pp. 2-7.)

The city by its answer set up defenses which were in brief that (1) the judgment in *Elliott vs.*

Port Townsend was void because it was then the law that a city could not be made liable on a street grade warrant, and the warrant in suit herein was ordered at a special, not a regular, meeting of the council; (2) the action was barred by the statutory limitation, because the city council in 1899 had declared it would not pay any such warrants; and (3) when the warrant in suit was issued there were judgments for about \$100,000 of street grade warrants, and like warrants not in judgments for about \$30,000 more; the judgments were taken by default under an agreement with the city council that the cases should go to judgment, although the Supreme Court had held that a city could not be held liable on such warrants; and the warrant in suit and others were issued voluntarily; that the city was beyond its debt limit at the time of their issue, the voters had never validated the debt, and the city council afterwards repudiated the agreement. (Transcript, pp. 11-36.)

All the essential allegations of the answer were put in issue by the reply. (Transcript, pp. 37-43.)

The reply, however, did not deny that the city was beyond its debt limit *in 1898 when the warrant in suit was issued*, because we deem that fact immaterial. *There was no allegation and no evidence that the city was over the limit in 1889 when the original grade warrant to Williams, the contractor,*

was issued, which was the basis of the Elliott judgment, nor even in 1897, when that action and judgment occurred.

At the trial before Hon. C. H. Hanford the foregoing facts were proved and also that the defendant Intermela had received by sundry remittances from the county treasurer sums for the indebtedness fund sufficient to pay the warrant in suit, which was No. 2, with interest, after payment of all prior charges on that fund.

The essential parts of the second and third defenses were in fact abandoned at the trial, as no evidence of any repudiation of the agreement with judgment creditors, or of any notice of such action of the city council was given; nor was there any evidence of any such agreement by the council that the warrant holders might take default judgments, as was pleaded; nor even that any default judgments were entered. (See Bill of Exceptions, Transcript, pp. 93-113.)

The findings (Transcript, pp. 59-61, 65-66) contain all the ultimate and essential facts to sustain a recovery and negative all the defenses.

POINTS AND ARGUMENT.

I.

THE CAUSE INVOLVED THE REQUISITE JURISDICTIONAL
AMOUNT.

The action was upon the official bond of the City Treasurer; and the breach assigned was the non-payment of a warrant under a state of alleged facts showing his then instant legal duty to pay it out of his official funds. If such was his legal duty, there was an instant breach of his duty and therefore a breach of his bond. The remedy given by law for that breach is a judgment for damages against him and his surety. The test of the jurisdiction, then, is: What are the damages? They may be *measured* by a prior obligation of the treasurer's principal whose funds he handles and the accrued interest on that obligation, but they are not *identical* with that obligation. If the action were against the city directly, on the original judgment or on the warrant issued to pay for the judgment, then the interest would be a mere incident of the original obligation and could not be reckoned as a part of the jurisdictional amount, *because the city was at all times from the entry of the judgment or issue of the warrant legally bound to pay it*, and the non-payment was a continuing default or breach of its legal duty. Not so with the treasurer. For

he was under no legal obligation to pay the warrant in suit until either (1) the city council ordered him to pay it, or (2) the holder presented it and demanded payment when there was money in his hands wherewith to pay it. At that instant and not sooner did his legal duty to pay come into existence and suffer immediate breach by his refusal to pay. Therefore, the damages arose at that instant and not sooner, and were measured by the amount *then due* from the city, and not by some amount previously due which grew *de die in diem* by the accrual of interest.

The distinction is clearly shown in one of the cases which the defendants' counsel cite:

Edwards vs. Bates County, 163 U. S. 269, in which the court held, directly against the defendants' contention, that defaulted coupons to a bond sued on with the coupons are of themselves primary obligations (although their origin was as interest) and could be reckoned as a part of the jurisdictional amount. And the same confusion of thought, between a principal and an accessory, is commented on in

Brown vs. Webster, 156 U. S. 328.

The same fallacy underlies the decisions in

Auer vs. Lombard, 72 Fed. 209; 19 C. C. A. 72, and

Howard vs. Bates County, 43 Fed. 276,

which must be considered to be overruled by the later cases cited in the Supreme Court.

On the same principle, it was held in

Zeckendorf vs. Johnson, 123 U. S. 817,

that on an appeal to the United States Supreme Court from a judgment of a territorial Supreme Court affirming the judgment of the territorial District (trial) Court, the test of the \$5000 jurisdictional limit of the Federal Supreme Court was the amount due at the time of the territorial *Supreme* Court, not *District* Court, judgment—thus including interest on the District Court judgment till it was affirmed by the territorial Supreme Court.

The learned district judge before whom the action was tried put the point very clearly and tersely in his “memorandum decision on the merits,” printed at pages 46-50 of the Transcript of Record.

II.

THE JUDGMENT, AND EQUALLY THE WARRANT ISSUED TO REPRESENT IN NEGOTIABLE FORM THE JUDGMENT DEBT, WERE INCONTESTABLE ON THE MERITS.

This point involves the two sub-heads that:

(1) The judgment was incontestable; (2) The warrant which was merely a convenient mode of providing ultimate cash to pay the judgment was equally incontestable.

1. The proposition that the judgment in *Alonzo Elliott vs. City of Port Townsend* was incontestable, depends upon the jurisdiction of the Superior Court of Washington in and for the County of Jefferson in that action.

Now the plain facts on that question are that the action was brought in that court (being the constitutional court of record of general civil jurisdiction), by service of due process, on a street grade improvement warrant dated February 11, 1889, based on the provisions of the state statute and the city charter respecting municipal powers to make improvements and the mode of defraying their cost by special assessments, and on city ordinances for carrying those provisions into effect and for making this particular improvement; that it was also alleged in the complaint in that action that the city had neglected its legal duty to enforce the special assessments and thereby lost the means of liquidating the warrants, and also to induce the contractor to undertake and fulfill his grading contract, had guaranteed to him the payment of the warrants issued under his contract, one of which warrants was the warrant in suit; that the city was then within its constitutional limit of indebtedness ($1\frac{1}{2}\%$) and hence was competent to contract such liability as a general municipal debt; and that by reason of said facts it became so liable on that war-

rant. See complaint in *Elliott vs. Port Townsend*, set out as part of the answer herein. Transcript pp. 12-31.

To that complaint the defendant city demurred by its official adviser—the acting city attorney—and on the overruling of the demurrer it “stood upon its demurrer” and judgment for the plaintiff Elliott was entered on November 13, 1897, for \$1523.42 with ten per cent interest from said date.

Transcript, pp. 38-40, 82-7, 108-9.

On February 14, 1898, the city appealed to the Supreme Court of Washington by the usual notice. By proceedings of the city council on February 15, 16, 17, 1898 (Transcript, pp. 70-77) which in effect were a compromise with Mr. Elliott and sundry other judgment creditors whose judgments were of the same origin, the city offered and the creditors accepted a reduction of interest from ten per cent to six per cent, and the city waived or abandoned its appeals and issued to the judgment creditors warrants for their respective judgments with six per cent interest from their dates to that time. The warrant in suit was consequently issued for \$1548.12 (being \$1523.42 and 6% interest for three months and four days) on February 18, 1898, and

was presented to the City Treasurer for payment and by him stamped "Not paid for want of funds," on February 19, 1898, and thereby under the statute legal interest began to accrue.

Transcript, pp. 5, 6, 70-77, 95-100.

The defendant attacks the jurisdiction of the court to render the judgment in the case of *Elliott vs. Port Townsend*, upon the ground that the court had no power under decisions of the Supreme Court of Washington to render a judgment against a city on a special street improvement warrant. We do not dispute the general doctrine that jurisdiction is not only the power to hear and determine, but also includes the power to render the judgment appropriate to the issues and the evidence. For instance, a decree adjudging a trust cannot be rendered in a criminal case for embezzlement; nor can a judgment of fine and imprisonment be entered on a debt, however atrocious the moral aspect of the debt. But the distinction between *lack of jurisdiction* to render a particular judgment and *mere error* in that judgment is easily obliterated by a slight confusion of thought; and we believe that confusion is exhibited in the defendants' brief. Nor do we deny that where there is lack of jurisdiction or power to render the judgment in question, it may be attacked

collaterally, as it is here. But it is easy to see that all the authorities cited to sustain the defendants' view on page 25 of their brief are inapplicable to this case.

State ex rel. Dodge vs. Langhorne, 12 Wash. 588, involved a petition by a witness in another action for an order in an insolvency proceeding to which he was not a party that a judgment creditor who had collected part of his judgment against the insolvent must pay the witness his fees. The court properly held it had no power in such a proceeding to make such an order.

Kelly vs. Milan, 127 U. S. 139, held that a consent decree in chancery, on a bill filed by a town attacking its railroad aid bonds, that the bonds were valid, was not a binding adjudication. Quite correct. But it involved the *town's* power to consent, not the *court's* power to decree. And it does not touch the Elliott judgment, which was rendered after a contest of the city's liability, by demurrer. A judgment on demurrer is as much *res adjudicata* as one rendered on trial of the facts.

State ex rel. Abernethy vs. Moss, 13 Wash. 42;
Gould vs. Evansville R. Co., 91 U. S. 526.

Canal Bank vs. Partee, 99 U. S. 325, held that a married woman in Mississippi was not

subject to a personal judgment for debt, without showing that she had a separate estate, and such a judgment was void.

Windsor vs. McVeigh, 93 U. S. 274, involved a decree of confiscation of property seized in a suit *in rem*: and it was held void because the court had stricken out the owner's appearance and refused him a hearing. The opinion, by Justice Field, says that the judgment must not transcend in its extent or character the applicable law; and that when jurisdiction has once attached "*everything done within the power of that jurisdiction, when collaterally questioned, is held conclusive of the rights of the parties, unless impeached for fraud.*" That is exactly where we stand.

Bigelow vs. Forrest, 9 Wall. 339, held that the power of the court to decree confiscation for participating in the Southern Rebellion was confined to the title for the life of the rebelling owner, and hence a decree forfeiting the fee was void as to the estate after his death.

United States vs. Walker, 109 U. S. 258, held that a probate court had no power to compel an administrator to account for cash realized from the assets to an administrator *de bonis non*, because his duty is to account directly to the heirs, etc.

These last two cases are instances of the fa-

miliar rule that courts of limited jurisdiction are held strictly to their limits.

Love vs. Blauw, 48 L. R. A. 257 (Kans.), held that there is no power in a court of equity to decree partition at the suit of the life tenant against the remaindermen in fee.

Hatch vs. Ferguson, 68 Fed. 43, and *Ritchie vs. Sayres*, 100 Fed. 520, applied the same familiar rule of limited jurisdiction to cases of a guardian's bond and an attachment of land of a non-resident as the essential bases of adversary proceedings whereby lands were sold. Of course such matters are *stricti juris*, and if the initial steps to gain jurisdiction are not taken, it never is gained and the whole superstructure is a nullity.

McKinnon vs. Johnson, 54 Fla. 221; 48 Sn. 910, is an ejectment in which various points of pleading, evidence, error, etc., are ruled; but we fail to see the applicability of any of them to the case at bar, except that the points decided fit in well enough, along with the law of this case, to the system of law to which they belong.

Russell vs. Shurtleff, 28 Colo. 414; 65 Pac. 27, simply holds that under a code which limits the judgment to the relief prayed for, a joint judgment

against all the defendants cannot be taken under a prayer for a several judgment against each in the proportion of his respective interest. This is good "crownor's quest law", but it bears very little on the case in hand.

Paul vs. Willis, 69 Texas 261; 7 S. W. 357;
and

Ewring vs. Mallison, 65 Kans, 484; 70 Pac.
369,

both decide the familiar point that jurisdiction in probate is limited to the county of decedent's residence, or death, or property, and for lack of any such fact may be collaterally attacked.

Branham vs. Mayor, etc., of San Jose, 24 Cal.
585,

rules that as a municipal corporation lacks the power to mortgage its property, no title whatever can be based on a foreclosure of such a mortgage even after sale, confirmation and entry. No one can doubt that!

Kane vs. Rock Rapids Ind. School-District,
82 Iowa 5; 47 N. W. 1076,

held that a judgment by default against the district entered by connivance of its board on a debt incurred when the district was indebted in about half of its assets, and was thus vastly beyond its constitutional limit, was open to attack by taxpayers for fraud. This decision has no applicability to the point it is cited to—which is lack of jurisdiction; and

as for fraud the defense at bar (apart from everything else) *lacks the vital element that the city was beyond its debt limit when the debt was incurred*—that is, on February 11, 1889. (Transcript. p. 27.)

Charleston vs. Beller, 45 W. Va. 44; 30 S. E. 152,

merely holds that in a prosecution under a city ordinance there is no power to adjudge costs against the city; hence, prohibition will issue.

Now in all this long list of cases cited in the defendants' brief there is not one which really meets the point at issue, or which does anything but lay down in general terms the doctrines about jurisdiction and collateral attack which no lawyer and no judge would dispute.

To bring these general doctrines to bear effectively on the case at bar we must come to close grips with the question: Had or had not the Superior Court of Washington in Jefferson County jurisdiction to render a judgment against the City of Port Townsend for damages for breach of its contractual and legal duties.

Here we come to the precise line between "*lack of jurisdiction*" and "*mere error*" in a judgment. Assuming jurisdiction of the *person* which is not here in question, lack of jurisdiction always consists in legal incapacity of the court either to act at all on the subject-matter, or to act under any cir-

cumstances in the way it does act; hence in either case its action is void. But if the court has the power to pass upon a controversy of a given class or nature, and to render a certain kind of judgment upon it, then its action thereon, however contrary to the rules of law or to the facts, is conclusive. A trial judge or an appellate court may decide a case absolutely contrary to the law or the facts, or both; there is no help for it except by appeal or other "direct attack" to correct the judgment. That is "*mere error.*" But if in a case for a personal injury against a mill company the court enters a judgment enjoining the company from operation, or appointing a receiver, until it pays the damages allowed, that judgment is *void*, because no court under our system of law has that power in any circumstances. On the other hand, if I am sued for a debt I never contracted, on false allegations, and I default the case and take no proper steps to assert my defense, either before or after judgment, I am bound by the judgment. Even if I contest in vain a fictitious claim, I never can be heard to say later that the judgment was *void*. So, many other instances on both sides of the line can be imagined. All this is "horn-book law" and is stated only to bring out in sharp relief the distinction between

powerlessness to adjudge, and incorrectness in adjudging, at all, or in a given way.

Now in the case of *Elliott vs. Port Townsend*, we may concede at this point (merely for the sake of argument) that the Superior Court ought to have, or would have, dismissed the action after a trial "on the merits"; that is, a hearing of evidence of the facts, *pro* and *con* the city's liability. We may even concede that it should have sustained the demurrer to the complaint on the ground that it did not state "facts sufficient to constitute a cause of action," i. e., it did not show the city was liable. Nevertheless, its actual decision was a "mere error." Any court has the power to say in any case within the class of cases with which it deals, whether a "cause of action" or a "defense" has been made out, by either allegation or evidence. That is of the very essence of judicial action. If a court cannot so hold, either way, right or wrong, it is a ridiculous absurdity.

This idea of "lack of jurisdiction" cannot be extended so broadly that it shall cover all cases or classes of cases where the courts hold a liability does not exist. For instance, it is the law in Washington (or was before the state went into the casualty insurance business) that contributory negligence of

an injured employe was a good defense to his employer. Granted the facts, the suit must fail. But no one would say that a contrary decision, in spite of these facts, was void.

The City of Port Townsend was a municipal corporation of the third class; that is, under 20,000 population. As such, it could sue and be sued, it could incur debts within its constitutional limit, it could make improvements, either at the expense of the citizens generally, or at that of those who were specially benefited; it could carry on the general activities of a modern city in matters of police, sanitation, lighting, etc.

In all these ways and many others, it could incur debts (up to the limit), and even by wrongful or negligent acts of its officers within their spheres of power and duty could incur liability for damages. The Elliott case was one involving the question: Has the city made itself liable for this special grade warrant, by guaranteeing its payment, or by neglecting to collect it from the lots or owners benefited, or by both? The case was one of a class of cases which the court had the power to pass on when brought before it; the court did pass on it rightly or wrongly; the defendant exercised its right to stand on the legal point of no liability, and

not contest the facts, presumably because its agents to which its interests were entrusted, concluded in the exercise of their honest judgments that such was its best course. The city took its appeal, but then immediately negotiated a compromise by which on this judgment and others for a large aggregate it saved four per cent interest per year for some fifteen years. Now we admit that if the Elliott judgment was void, the warrant issued to pay it, here in suit, was void. But it has never been decided by the Supreme Court of Washington or by any other respectable court that a judgment such as this is void for lack of jurisdiction or is vulnerable except as an erroneous judgment. The judgment in form and substance is just such as should have been granted in an action against a city on a liability where by law or by contract interest at ten per cent ran on the liability. We therefore meet the test in the above quotation from Justice Field as to "the extent and character of the judgment rendered." Granted the liability, no other judgment was possible. But whether there *was* liability, was the precise point before the court; *and an erroneous decision does not impeach or avoid jurisdiction.* Jurisdictional power or its lack is equally available for each party, and equally vital or fatal to a decision for either side. Estoppels are mutual. If the decision of the Superior Court had been the other way, could Elliott, or the plaintiff

here, have said the judgment was void and hence we could re-litigate the question? The conclusive answer would have been that the court had passed finally on a case where it had the power to decide whether the city was liable, and having said it was not, we could not re-try the question. This shows that the real objection of the city to the judgment is not that the court could not try cases against cities on alleged liabilities for street grade warrants, but that the court under the then latest ruling of the Supreme Court should render a decision in only one way. But that is a matter *of error, not of jurisdiction*. It has never been held that jurisdiction is made and unmade by the latest rulings of the Supreme Court. If it were the jurisdiction of trial courts in some states would be in a state of perpetual flux, instead of being the most stable thing in the judicial system. Judges come and go, grounds of action or defense change with legislation or court decision; *but jurisdiction abides*.

Two citations in the defendants' brief are wholly inapplicable to this point.

In re Permstick, 3 Wash. 672, holds that a judgment in a criminal case that the complaint was malicious and causeless and the complaining witness shall stand committed for payment of the costs is void. That is a case of a judgment of other "extent and character" than was appropriate to that class of cases.

A county not being liable to garnishment in any case under the statutes as construed by the Supreme Court, it properly held that a judgment of garnishment against a county was void.

State ex rel. Summerfield vs. Tyler, 14 Wash. 495.

But in that very case the distinction between error and non-jurisdiction is clearly drawn by the then Ch. J. Hoyt:

“It is familiar law that a judgment rendered in an action in which a court has jurisdiction of the person upon a complaint which does not state a cause of action is not void but simply erroneous. * * * *If the county could not be sued at all*, a judgment against it would be absolutely void. * * * If on the other hand it was subject to garnishment, the claim that the judgment was void by reason of the fact that the particular debt which was sought to be reached was not subject to garnishment cannot be sustained. Such a fact might be sufficient to show that the court *committed error in the rendition of the judgment*, but would not be sufficient to show that it acted without jurisdiction in so doing.”
14 Wash. 497.

The court thereupon construed the statute to not include counties among those subject to garnishment and therefore *there was no such action possible under any circumstances*.

By parity of reasoning the city would not be liable in any event on any case for damages from breach of its contract or neglect of its duty, if the

law did not permit any action to be brought against the city *in any event on any such state of facts*.

That would mean that the court *had no power* over the city. But if the court can entertain actions against cities to enforce their liabilities arising from their transactions, then it has jurisdiction of any given case of that character, and its judgment for either party, whether right or wrong, is binding on both.

The general doctrine that a judgment is a bar to any defense which was raised or might have been raised in the action is settled in this court by the cases (among others) of

Cromwell vs. County of Sac., 94 U. S. 351;
and

United States vs. New Orleans, 98 U. S. 381;
and in the State of Washington by the case (among others) of

State ex rel. Ledger Pub. Co. vs. Gloyd, 14 Wash. 5.

An analysis of the cases in Washington on special warrants for improvements in suits against cities shows that there was no lack of jurisdiction in this case.

On February 11, 1897, the Supreme Court of Washington, in

Bank of B. C. vs. Port Townsend, 16 Wash. 450,

held that a city which had issued a special warrant and contracted to provide for the payment of it is subject to a judgment on its contract, payable out of the general fund. This case was considered to have settled the law in Washington on that point until

German-American Sav. Bk. vs. Spokane, 17 Wash, 315,

unsettled everything, opened a door to repudiation for bankrupt cities, and caused much litigation.

Only three days earlier, this court in

Denny vs. City of Spokane, 79 Fed. 719,

had held that the defendant was liable on a street grade warrant where it had agreed to levy and collect the assessment without delay, but owing to its mistake as to the law its ordinance was void and some of the reassessments failed through outlawry.

Both of these cases were based on contracts made and warrants issued for street improvements in 1889 and 1890. The court will please to note that the original warrant in this controversy was issued in 1889.

Between 1889 and 1897, several decisions on such special warrants were made in Washington, most of which are cited in *Denny vs. Spokane*.

Baker vs. City of Seattle, 2 Wash. 576, (1891)

held that such warrants were not to be reckoned

within the general indebtedness, under the constitutional limit.

Soule vs. City of Seattle, 6 Wash. 315, (1893) held that the warrant holder, under the peculiar provisions of the city charter, could not recover against the city, but left it "an entirely open question whether municipalities may not, under different circumstances, make themselves liable *by omissions of the character presented here*"—which were neglect for some years to reassess.

Spokane vs. Browne, 8 Wash. 317, (1894) recognized the right of the city to reimbursement by the lot-owner for the obligations it had incurred in his behalf.

Then came the case of

Stephens vs. Spokane, 11 Wash. 41, (1895) where it was held that a city is not limited to special assessments, and is liable when it has taken no steps for five years to collect the assessment. In the case at bar the neglect was for nine years—from Feb. 11, 1889, to Feb. 19, 1898.

Thomas vs. Olympia, 12 Wash. 465, (1895) distinguished *Stephens vs. Spokane*, and held that where the city has in good faith and with care made the assessment, and failed to collect it because

of adverse court rulings and has taken steps to make a new assessment, it cannot be held liable; and also if the contractor by the terms of his contract waives the right to pay in any way except by special warrants, he cannot recover from the city on the score of its negligence.

Frederick vs. Seattle, 13 Wash. 428, and
Cline vs. Seattle, Ibid. 444 (1896)

sustained reassessments after invalid primary assessments. They are cited here only to show that municipal officers were endeavoring in the light of the previous rulings to relieve the city from liability for neglect to collect the assessments. They go to show that it was the general understanding at the time not that a city could under no circumstances become liable on a street contract, but that it might or might not be liable according to the circumstances. That notion is destructive of the theory of no jurisdiction.

On a second appeal the *Stephens* case appears again as

Stephens vs. Spokane, 14 Wash. 298, (1896)
 where the court held that even on a showing of negligence the city is not liable, “*unless it has failed to take any steps for the creation of the special*

fund upon which the warrants were drawn, or has been guilty of such negligence in what it has attempted to do that the right to cause such fund to be created has been lost" (p. 301). In other words the city is not exempt absolutely, nor liable absolutely, but is liable *sub modo*. Now those are the precise allegations made in *Elliott vs. Port Townsend* (Transcript, p. 29) and the pleader must have drawn his complaint with 14 Washington Reports open before him at page 301.

Next came the cases of

Bank of B. C. vs. Port Townsend, 16 Wash. 451 (Feb. 1897),

already summarized, and

McEwan vs. Spokane, Ibid. 212 (Dec. 1896), cited by this court in *Denny vs. Spokane*, and which held that under a contract to provide a fund to pay the warrants, and to proceed without delay to that end, and under allegations of neglect to provide any fund, the city was liable, and its mistaken view of the law will not save it.

Then came the case of

German-American Sav. Bk. vs. Spokane, 17 Wash. 315 (July, 1897),

on which the defendants rely, and which overruled *McEwan vs. Spokane*, and qualified other earlier decisions of the same court.

But it is to be especially noted that in none of the Washington cases hitherto was there a syllable intimating that there was no jurisdiction in the trial court, but only that in a given state of facts no cause of action was shown. That was the jurisdictional subject matter before the court.

At this point the court should also note and bear in mind that while the *German-American Bank* case held that when a city has reached its constitutional debt limit it cannot make itself generally liable by contract respecting special improvements, and the facts there involved that point, no such state of facts existed here at the inception of this liability—as we shall show later.

Proceeding onward from the date of the *German-American Bank* case, we find the course of decision in Washington was this:

Wilson vs. Aberdeen, 19 Wash. 89, and
R. I. Mtge. etc. Co. vs. Spokane, *Ibid.* 67,

both decided in 1898, followed said case and held that the city was not liable, even where the remedy against the lots was lost by its neglect.

So did

Doxy vs. Port Townsend, 21 Wash. 707 (1899).

Next came

Northwestern Lumber Co. vs. Aberdeen, 22 Wash. 404 (1900),

which followed as to two warrants in suit the *German-American Bank* case, but where the city had collected the money and exhausted the fund by paying warrants out of their order of issue, held that the city was liable on a special warrant of date prior to those paid. It certainly could not be argued that the court had no jurisdiction of one part of this case, although it had of the other part.

Potter vs. Whatcom, 25 Wash. 207 (1901) was a case of the assessment (being based on the benefits received by the adjacent property and not on the cost of the improvement) falling much short of the cost; and the court held that the city was not liable. But the court had held on a previous appeal in the same case that the city was liable where it collected the money and its treasurer embezzled it;

Potter vs. New Whatcom, 20 Wash. 589 (1899); and also was liable for the accumulated interest where it had failed to include any more than the face of the warrants in a re-assessment.

Phila. &c Trust Co. vs. New Whatcom, 19 Wash. 225 (1898).

It is hard to see the distinction in respect of liability for not raising enough money to pay inter-

est and not raising enough to pay prime cost. But the point to be noted here is that no possible line of *jurisdiction* can be drawn between cases where the city by its action or inaction incurs, and others where it escapes, liability.

State ex rel. Security Sav. Society vs. Moss,
44 Wash, 91, (1906).

was a mandamus to compel a city treasurer to pay general fund warrants. The city was incorporated under a statute afterwards held unconstitutional. Later it procured a valid reincorporation; meantime, under the *de facto* but void incorporation it had let a street improvement contract; the work was done, and warrants issued; the city later attempted to validate the debt and issue its "general fund" warrants to take up the special warrants. The court held that the case was ruled by the *German-American Sav. Bank* case and there was no consideration for the general warrants.

State ex rel. Am. Freehold-Land Mortgage Co. vs. Tanner, 45 Wash. 348, (1907),

decided on the face of the pleadings and admitted facts, on certain warrants issued to pay judgments against Port Townsend on street grade warrants, that such warrants were open to attack on the ground of collusion of the city officers in letting the judgments go by default and were therefor voidable for fraud. Those judgments were taken some time after that of *Elliott vs. Port Townsend*; there is no

allegation, admission or evidence here of fraud; and the case above cited is totally unlike that at bar in its essential features. It is further to be noted that the Supreme Court of Washington entirely ignored in that case its own decisions regarding collateral and direct attacks on judgments; and in view of the well-settled law in the Federal Courts on that subject the decision cannot be of authority here.

Soule vs. Ocosta, 49 Wash. 578, (1908), simply applied the rule of non-liability to warrants where the property was not benefited nor anything ever paid into the special fund.

Jurey vs. Seattle, 50 Wash. 272, (1908), held that the city's liability for diversion of the special fund sounded in tort, and was barred by charter provisions as to filing claims for damages.

We have thus by a careful analysis of all the decisions cited in the defendants' brief on a city's liability on special warrants, and of some others, shown that in every case the question was treated as purely a matter of *liability*—a question of the existence or proof of "a cause of action." In not a single case is there a single phrase hinting at the lack of jurisdiction of the courts to entertain and pass on such cases. And in none was there a question of the binding effect of judgments—the doctrines of *res judicata* and "direct attack," except in *State ex rel. Mortgage Co. v. Tanner*, 45 Wash. 348, where

by a most violent straining of precedents and settled law the court was able to reach a judgment which it doubtless deemed just "on the equities" by ignoring the law.

We conclude, then, that there was no lack of jurisdiction and that the judgment in *Elliott vs. Port Townsend* was a valid and binding judgment, not open to question as to the city's liability in any way except by appeal or other "direct attack" in due form.

But there is another aspect of the case which strengthens (if needed) our position.

The original street grade warrant was issued on February 11, 1889, to W. C. Williams, the contractor. Some time between that date and June 1, 1897, it passed in the course of business and for value to Alonzo Elliott. It also received the approval and ratification (if any were needed) involved in the payment of interest down to August 11, 1892, a period of three and one-half years from its issue.

Now, under these circumstances the doctrine of

Gelpcke vs. Dubuque, 1 Wall. 175.

applies directly. And the case of

Douglass vs. Pike County, 101 U. S. 677, which the defendants' counsel cite as holding that the Federal Courts follow state law itself lays down

the very doctrine of *Gelpcke vs. Dubuque* and is a pointed application of it. In the period of over thirty years which has elapsed since those two cases were decided, they have been cited, followed and applied in innumerable instances by the Federal Courts, and to a great variety of facts, and their doctrine is now firmly imbedded in federal jurisprudence for the protection of innocent investors. What, then, is that doctrine?

It is that when the state courts have decided the law one way, and in that state of the law rights have been acquired which would be affected or imperilled by later decisions changing the rule of law applicable to such facts, the Federal Courts for the protection of the vested and constitutional rights thus acquired will follow the earlier, not the later, decisions.

In *Douglass vs. Pike County*, Ch. J. Waite said that while the state courts had the right to change their opinions, such changes should (like a new statute) change the law only prospectively, not retrospectively, in its application to contract rights acquired on the faith of the earlier decisions. Now that is exactly the case here. When the Washington Street contract was let and the work done in 1888, and the first warrant issued in 1889, it was considered to be the unquestioned law of Washington that cities could make themselves liable on the contracts for street improvements, even if the cost

was to be raised by a special assessment. That is shown by the forms of contracts made in the earlier cases reported: that the city would guarantee payment; or would proceed without delay to make collection, or would cash the warrants if the assessments were not paid in promptly. In one case the court held that a city was equitably subrogated to the rights of warrant-holders whom it had paid.

On the faith of that state of the law the Williams warrant was issued and was bought by Elliott, and was put into judgment. Then, a few weeks after Elliott filed his demand for payment with the city council, and a few months before he got judgment, the Supreme Court of Washington made a decision that cast great doubt on the validity of street improvement warrants, overruled directly some of its earlier decisions and shook the authority of others; yet even that decision did not go so far as some later ones, but left it open to establish the city's liability by taking certain steps to compel its action.

If, then, we measure the facts of this case by the rule of *Gelpcke vs. Dubuque*, we see that it disposes effectually of three contentions of the defendants: (1) that the city is not and was not in 1898 liable on the original warrant, and on the Elliott judgment taken on it, and on the warrant in suit herein; (2) that because the Supreme Court of Washington has held in a line of cases beginning in

1897 against the city's liability, therefore the Elliott judgment was void for lack of jurisdiction; and (3) that because of that assumed exemption of the city from liability the acquiescence of the city council in the Elliott judgment instead of contesting it on appeal was a fraud on the taxpayers, concocted in a collusive agreement between *the entire city administration*—mayor, attorney, clerk, marshal and seven councilmen, all present at all the meetings and conferences—and the judgment creditor.

A few words further about this defense of fraud. In the first place, it is really not pleaded, although it is argued in the brief. Fraud must be proved, not surmised. But it must also be pleaded, not merely argued. The first defense pleaded (Transcript, pp. 11-32) is a strictly *legal* plea, that the judgment and warrant were void because the city could not be made liable. The second (Transcript, pp. 32-33) was the statute of limitations, based on an alleged repudiation of the compromise which was not attempted to be proved. The third defense (Transcript, pp. 33-36) was that the city council had made an agreement to let the warrant holders take default judgments, after the court had decided that a city could not be made liable on them, and after the city had exceeded its debt limit. Not a word

charges any secrecy, corrupt consideration, private understanding, collusion, or even knowledge of the city officials that the Supreme Court had recently decided as alleged. It is to be presumed that the city attorney knew the law, including the recent decision; but it is also to be presumed that he also knew the law as settled many years earlier by *Gelpcke vs. Dubuque*, and could see its application to the facts before him; and that weighing the law and the facts he advised his client through its constituted authorities that even if there was some doubt, or a "fighting chance," the equities were with the judgment creditors and that it was better for the city to settle. It is also to be presumed that he and all the rest of the officials were honest men. They were all engaged for three days as is shown by the council minutes in negotiations; all were present; there was no inside coterie which "fixed things up"; the meetings were in the day time, and their delays from day to day showed deliberation, effort for the best terms obtained, and suggest consultations with other citizens. Here is nothing which smells of fraud; and the attempt to put its stigma on a group of honest citizens who were trying to do their best for a city whose folly had plunged it into a bog of debt, and the fact that this attempt is sup-

ported by innuendo and suggestion without a bit of evidence shows the desperate straits of the defense.

(2) If the Elliott judgment was valid and is now unassailable, of course the warrant issued in lieu of it and in consideration of its discharge is equally beyond question. The statutes of Washington prohibit the issue of execution on judgments against municipal corporations, and provide no way of converting the judgment into cash except by issuing a warrant on proof of satisfaction of the judgment. Of course if the defenses against the original cause of action could be set up over again to defeat the warrant we would have an endless chain of putting claims into judgment, taking out warrants, putting those warrants into judgments, and repeating *ad infinitum*.

III.

THE PROCEEDINGS OF THE CITY COUNCIL WERE LAWFUL
AND REGULAR.

The point of the defendants' argument is that the meetings of the council on February 16 and 17 were in violation of the statute, 2 Remington & Ballinger's Ann. Codes, Wash. § 7681, and of a city ordinance.

There are four answers to this argument. First, the meetings on February 16 and 17 were not adjourned meetings but the same meeting continued after the intermission of a recess. Taking a recess is a different thing from an adjournment; and evidently the council was particular to take a recess. It made a point of strict compliance with the law. Secondly, the statute is to be strictly construed and it does not forbid an order to pay a definite, liquidated sum of an unquestioned liability. The phrase, "Bill for the payment of money," clearly means unsettled accounts open to inquiry, adjustment or set-off. It does not mean an indisputable debt on judgment as to which the only topic of debate could be whether to pay it or contest it by appeal. Thirdly, the statute should not be construed as mandatory, where the act criticised is not of the essence of its proceeding. There was ample deliberation and debate; in the nature of things there could be no objection when the members had once made up their minds to ordering the appeal abandoned and the warrant issued at that meeting, instead of waiting two weeks for the date of the next regular meeting. Fourthly, as the learned trial judge well put it, the validity of the warrant does not depend on the regularity of the meeting or the proceedings, because

the city officers were compellable by *mandamus* to issue it. (Transcript, p. 49.) The city's counsel attempt to meet this by saying that the appeal being duly taken acted as a *supersedeas*. We admit that the appeal was taken in time and a bond was not essential to the appeal. But the statute does not enact that an appeal by a city without a bond shall act as a *supersedeas*; and as we understand the practice a bond is as needful from a city as from an individual to effect a stay. Therefore, the issue of the warrant could have been enforced pending the appeal. But waiving that, the council had decided to abandon the appeal, and had negotiated for a settlement, including a reduction of interest on that basis. Though the record is bare of any formal resolution to that effect, it is clear that such was the basis of the entire negotiation. It was the implied condition precedent, because it would be folly for either party to settle if the appeal were to stand. There is no showing whether an appeal was taken in any other than the *Elliott* case, or when the appeal periods would expire; but whether or not, the other judgment creditors accepted "the proposition of the city council" (Transcript, p. 72); and nothing in the statute as to council meetings forbids a negotiation and agreement about a judgment debt. There-

fore it results that after the city had waived its appeal, the judgment creditor was induced by its offer to satisfy the judgment and accept the warrant. The appeal being waived, the city could have been compelled to issue the warrant if it refused to; and if it repudiated the agreement it would have been equitably estopped to withhold the warrant when the judgment had been satisfied on the faith of the city's promise. Judge Hanford's inference, then, was exactly right.

Estoppel is as applicable to a city as to an individual.

2 McQuillan on Municipal Corporations, 1384.

Soc'y. for Savings vs. New London, 29 Conn. 174, 192.

N. H. W. R. R. Co. vs. Chatham, 42 Conn. 465, 479.

Gilberts vs. Rabe, 49 Ill. App. 418, 421.

On the general question of the regularity of adjourned meetings, see

2 McQuillan on Municipal Corporations, 1326, and cases cited.

State ex rel. Atkinson vs. Ross, 46 Wash. 28, applies the rule of liberal construction to council meetings, and in its reasoning sustains the foregoing remarks.

IV.

THE TREASURER WAS IN FUNDS TO PAY THE PLAINTIFF'S
WARRANT.

The learned trial judge found as a fact that the treasurer had in his hands on December 1, 1910, when demand to pay the warrant was made more than enough applicable cash to pay it.

Transcript, p. 61.

All outstanding warrants dated on or before February 2, 1898, were called on April 15, 1908.

Transcript, p. 104.

The burden of proof was on the defendants to show that any other warrants were outstanding of prior date to the plaintiff's.

The plaintiff also proved that the city treasurer had received from the county treasurer sundry sums from sales of county realty (acquired by tax-foreclosure), sundry sums in 1909 and 1910 aggregating about \$8000; and that by Ordinance No. 722 it was the city treasurer's "duty to turn in to the indebtedness fund all moneys received by the city from the county of Jefferson for its share of the proceeds of the sale of any county property."

Transcript, pp. 100-104.

The statute bearing on this subject as it was until March 16, 1897, is quoted at pages 21, 22 of the defendants' brief; and on page 22 follows the statute (Session Laws 1897, ch. 84) which went into effect on that date. The latter statute, as construed by the Supreme Court of Washington, created an "indebtedness fund," which was a substitute for the former "general fund," under the prior law (Hill's Ann. Codes, § 636; Session Laws 1893, ch. 57, § 2, Subd. 9, p. 105). But the change by the law of 1897 in the character, sources and disposition of the two funds could not affect rights of creditors vested before the latter act was enacted.

State ex rel. Polson vs. Hardcastle, 68 Wash. 548.

The same tax—six mills—was imposed in each act for payment of indebtedness, and it became the duty of the city council to levy it each year. This was expressly ruled in the case just cited. While the later act could not lawfully deplete or divert the sources for paying city debts, it could and did simplify, systematize and strengthen the method of payment. Consequently all proceeds of lands sold for taxes and of county lands acquired by tax sales and later sold by the county were due to the indebtedness fund for the relief of creditors antedating (as Elliott

was) the act of 1897, notwithstanding section 8 of that act. And at the same time such prior creditors were entitled to have the moneys mentioned in § 647 of Hill's Codes (Session Laws 1890, ch. 7, § 128, p. 190) still deposited in the "general fund" which was succeeded by the "indebtedness fund." In this state of legislation and of the fact of treasury transactions shown by the record, a strong *prima facie* case of ample funds to pay the Elliott warrant, ^{created} It was incumbent on the defendants, having in their own hands the evidence to disprove that conclusion if it existed, to produce such proof; and the fact that they have not done so is decisive that no prior charges on the "indebtedness fund" were outstanding and unpaid on December 1, 1910, and that there was then ample cash in hand to pay it.

The judgment below should be affirmed.

CHARLES E. SHEPARD,

Attorney for Defendant in Error.

ADDENDUM TO POINT II.

Judgment on a general demurrer is final and concludes the merits.

Plant vs. Carpenter, 19 Wash. 624.

The defense of excess of constitutional limit of debt is barred by a judgment on the merits.

State ex rel. Gloyd, 14 Wash. 5.

ADDENDUM TO POINT IV.

At the request of the defendants, the court modified its fifth finding of fact, respecting the amount in the treasurer's hands applicable to our warrant (Transcript, p. 61), and made it read more specifically (Transcript, pp. 65-66), that all obligations of the city prior or preferential to that warrant had been paid before the demand on December 1, 1910, and the treasurer then had in hand \$4,674.69, proceeds of sale of land for taxes; and the same finding included §9 of Ordinance No. 722, defining the monies to go into the indebtedness fund, and forbidding the treasurer to pay any warrants on that fund except "special named classes," without special order of the City Council."

The city having ordered the issue of the warrant,

it was the treasurer's duty to pay it on demand if he was in applicable funds of five hundred dollars or more.

2 Remington & Ballinger's Code, §§3949, 7696.

It being his legal duty to pay it, refusal to pay was a breach of his official bond.

1 Rem. & Bal., §§958-59.

McConoughey vs. Jackson, 35 Pac. 863 (Cal.).

Rice vs. Gwynn, 49 Pac. 412 (Idaho).

Bank vs. Arthur, 54 Pac. 1107 (Colo.).

Ireland vs. Hammell, 57 N. W. 715 (Iowa).

The prohibition on the treasurer to pay it, without special order of the Council was void, as an attempt by city ordinance to override and obstruct the operation of state statutes.

Brown vs. Winterport, 9 Atl. 44 (Maine).

It is beyond question, then, that there was no prior claim, the treasurer was in funds, and he was bound to pay.

7

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

CHARLES L. INTERMELA and the AMERICAN SURETY COMPANY, a corporation, of the State of New York, <i>Plaintiffs in Error,</i> <i>vs.</i> DAVID PERKINS, <i>Defendant in Error.</i>	}	No.
---	---	----------

Petition for Re-hearing

Now comes the plaintiffs in error by their attorney and counsel, U. D. Gnagey, and deeming themselves aggrieved by the judgment of this court affirming the judgment of the district court entered February 15, 1912, petitions for a re-hearing and a reversal of said judgment.

U. D. GNAGEY,
Attorney for Plaintiffs in Error.

I hereby certify that, in my judgment, the foregoing petition is well founded in law and is not interposed for delay.

U. D. GNAGEY,
Attorney for Plaintiffs in Error.

GROUND OF THE PETITION.

The grounds of the petition are as follows:

First. The court erred in deciding that the treasurer was in funds to pay the warrant in suit.

Plaintiffs in error raised this question not only by their non-suit, but also by a challenge to the sufficiency of the findings to support the judgment.

11 Specification of Error, brief p 14.

26 Assignment of Errors, p 122 of the Record.

In their brief on page 37, plaintiffs in error say:
“The findings do not support the judgment, etc.”

* * *

The fifth finding of fact is found on page 65 of the record and that portion of it material to this argument reads as follows: “and that between the 4th day of January, 1910, and the 1st day of December, 1910, both inclusive, said city treasurer received as the city’s share of the proceeds of the sale of property that had been forfeited to the county for non-payment of taxes the sum of \$5674.69.”

If this finding does not show the treasurer in funds, the judgment must fall. Defendant in error cannot go behind this finding and support his judgment by inferences that may be drawn from the bill of exceptions. Plaintiff never complained of these findings and the bill of exceptions is not here for

this purpose.

The court, in giving its decision, has taken from the bill of exceptions a part of a letter as follows:

From sales of county real estate, lands and premises	\$ 851.23
From year 1904 tax rolls.....	.96
From year 1905 tax rolls.....	1.44
1906 tax rolls.....	8.14
1907 tax rolls.....	1922.86
<hr/>	
Total.....	\$2784.63

And from this part of the evidence draws the inference of funds, stating that the different tax rolls mentioned might contain a levy for the Indebtedness Fund. In the first place there is absolutely no evidence that there was a levy for the indebtedness fund for these years; and in the second place, the evidence was not introduced for any such a purpose. It was introduced solely for the purpose of showing receipts from the sale of county realty. One letter was introduced in full to show its nature and between whom passing, and all the others were introduced by simply showing the proceeds from the sale of county realty.

It would be a rather far-fetched inference even if it were in the findings, but as it is not in the findings it cannot be used to sustain this judgment. The judgment will have to stand or fall on the findings.

The court in its decision on page 8 uses the fol-

lowing language: "it would seem that there was competent evidence adduced from which the court could reasonably deduce its findings that the city treasurer was in funds sufficient to pay the warrant, and applicable thereto, at the time of its presentation."

I wish to call the court's attention to the fact that the lower court never made such a finding. It had made such a finding, as will be seen by a reference to the record, p. 61, finding "Fifth". But the court's attention having been called to the fact, it revised its "Fifth" finding on motion as shown by the record pp 64, 65 and 66, and instead of finding "that the defendant Intermela had in his hands, as treasurer of the City of Port Townsend, on that date more than sufficient money which was applicable to the payment of said warrant to fully pay the same, both principal and interest," the court realizing that there was nothing in the evidence to warrant such a finding, changed its fifth finding and found in this respect simply that the treasurer received a certain amount of money from the sale of county realty, making it large enough to cover both principal and interest, and leaving it as a question of law whether or not this money so coming from the sale of county realty was applicable to the payment of this warrant.

The court in its decision on page 8, says after a discussion of this matter. "There is far from being such a lack of evidence upon the subject as that this court will set aside the findings of the trial court."

It is not a question of setting aside the findings of the trial court. While plaintiff in error contend that their motion for a non-suit should have been granted, they also contend that the special findings of the lower court do not sustain the judgment. The findings of the court in this particular respect are in accord with the evidence, but they do not support the judgment in this, that they do not show that the treasurer had moneys belonging to this particular fund on which the warrant was drawn.

11 Specification of Error, Brief p 14.

AS TO DIFFERENT FUNDS.

It seems that the court is laboring under a wrong impression in regard to the different funds of the City of Port Townsend, and in regard to the status of the warrants in suit with reference to such funds.

The warrant in suit was issued and drawn on the Indebtedness Fund on February 18, 1897. (See copy of warrant, record p 4.) The law creating the Indebtedness Fund went into effect February 1, 1898.

This warrant was issued on this fund by agreement between the warrant holder and the City Council, after such law went into effect and the law of such fund must apply to its payment. This Indebtedness Fund is supplied only from two sources, first a special levy that the City Council may make; and second, delinquent taxes for the year 1896 or previous years.

Sections 3 and 7 of Act of 1897, L of 1897, p 222, Brief p 22.

This record absolutely fails to show that the treasurer, after the warrant in suit stood next in order of payment, received any money from either of these two sources, and fails to show that he had any funds on hand when the warrant was presented for payment properly belonging to the Indebtedness Fund.

The question of funds was one of the principal issues in the case and it should be decided by positive proof before the treasurer and his bondsmen should be held liable in damages. The allegations of the complaint are "that on said 1st day of December, 1910, and for several months prior thereto, there was and had been in the hands of the defendant, Charles L. Intermela as treasurer of the said City of Port Townsend, MONEY BELONGING TO THE INDEBTEDNESS FUND of said city, sufficient to pay the plaintiff's said warrant, both principal and interest in full," etc. and this allegation is denied and an issue raised upon it.

. The warrants involved in the case of State *ex rel.* Polson v Hardecastle, 68 Wash. 548, had altogether a different standing. Those warrants were issued long before the Indebtedness Fund was created and were drawn on the General Fund. Afterwards the Indebtedness Fund was created and the law creating it took effect February 1, 1898. It was the intention of the law that all warrant indebtedness existing at the time of the taking effect of this law should be paid

out of this fund. But the court in the Polson case, *supra*, rightly decided that the holder of a warrant drawn on the General Fund before the Indebtedness Fund Law went into effect, could not be restricted to such Indebtedness Fund.

The City of Port Townsend had warrants outstanding similar to those involved in the Polson case and they are mentioned in section 9 of Ordinance No. 722, found in the fifth finding of fact on page 66 of the record, as being drawn on the General Fund, Road Fund, etc.

Planiffs in error cited the Polson case simply for the purpose of showing that the city was under different obligations with reference to such warrant from its obligation with reference to the warrant in suit, and for the purpose of showing that the City Council could for legitimate purpose, place all moneys coming from the sales of County realty into the Indebtedness Fund, that is for the purpose of paying the warrants therein, that is in said section 9, mentioned, and yet none of such money really belonged to the Indebtedness Fund, unless it came from delinquent taxes for the year 1896 or previous years, and hence the restriction placed on the treasurer in regard to paying such money out, was perfectly legal, so far as the warrant in suit is concerned, so long as they did not try to keep him from paying out money that really belonged to the Indebtedness Fund.

There is absolutely no evidence that any of this

money really belonged to the Indebtedness Fund.

The case being against the treasurer and his surety for damages for dereliction of duty, and not against the City and the question whether the treasurer had sufficient money belonging to the Indebtedness Fund to pay this warrant, being one of the principal issues in the case, and really the important issue, by means of which defendant in error can proceed against the treasurer at all, it is difficult to understand why the court should not require positive proof on such issue.

I wish to call the court's attention again to the fact that it is not a matter of setting aside the findings of the lower court. The lower court never found that he had sufficient money belonging to the Indebtedness Fund to pay the warrant, but simply found that after plaintiff's warrant stood next in order for payment, the treasurer received a certain sum (more than the amount of the warrant) from the sales of county realty, and left the matter open as a question of law whether the money received really belonged to the Indebtedness Fund.

Again, the city treasurer could not be held liable for what the city council ordered him to do. The question is, what did *he* do? What is *his dereliction of duty* for which he is to be held liable? Where is the finding that shows that the treasurer was in funds, upon which he is to be held liable in damages?

As to the jurisdiction of the court in the case of Alonzo Elliott v the City of Port Townsend to render the judgment in satisfaction of which the warrant in suit was issued.

We are aware that there are all sorts of cases on the subject of jurisdiction, and to my mind, a great many of the distinctions that have been made between judgments that have been held void and those that have been sustained consist simply of words and not of controlling ideas.

As an example we will take the case of Branham v Mayor of San Jose, 24 Cal. 588. In this case the court ruled that as a municipal corporation lacks the power to mortgage its property, no title whatever can be based on a foreclosure of such a mortgage even after sale, confirmation and entry, and the judgment of foreclosure was held void.

The case at bar stands on the same footing as the San Jose case, *supra*. The judgment of foreclosure in the San Jose case was held void because such judgment was based upon an obligation against the City of San Jose, which it could not incur against itself. So the judgment against the City of Port Townsend in favor of Alonzo Elliott was based on an obligation against the city which it could not incur against itself. The controlling idea is the fact that the obligation which is made the basis of this judgment has no existence, and a court by its decision cannot create it.

The court in the San Jose case might have said that whether the city could bind itself by a mortgage on its property was one of the questions that the court would necessarily have to consider in foreclosing the mortgage, and the fact that it decided erroneously, does not make the judgment void. This is exactly what the court has said by its decision in the case at bar. But the decision overlooks the fact that there is no obligation and that the court cannot create one.

The case of Canal Bank v Partee, 99 U. S. 325, is based on the same principal.

In practically all of the cases cited by plaintiffs in error in which judgments have been held void for lack of jurisdiction, and in practically all cases that can be cited on the subject of lack of jurisdiction of subject matter, there was a point of law involved which it might be said the court rendering the judgment had the power to consider, and the fact that the court decided wrong does not make the judgment void. But if this idea be carried to its limit there could scarcely be a judgment that would be void for lack of jurisdiction of the subject matter, for whenever any court renders a judgment it really decides that it has the power to render it.

As stated in the argument before the court, the true line of distinction seems to be the fact that the claim on which the *void* judgment is based belongs to a class of claims on which there is no liability. If

it can be determined that there is and can be no obligation without going into the evidence in the particular case, the judgment is based on nothing and is void, and the court has no power to create something out of nothing.

State ex rel. Summerfield v Taylor, 14 Wash.
495.

In re Permstich, 3 Wash. 672 (By analogy.)

It was not necessary that a decision of the Supreme Court of the state absolutely declaring the non-liability of cities in such cases should have existed at the time the Elliott judgment was rendered. The real question is, What is the law now? Decisions of courts are necessarily retroactive. If the Supreme Court at that time had decided that the city could not be held liable in such cases, and the city officers after receiving knowledge of such decision had paid the judgment without appealing, it would simply show that there was "something rotten in Denmark," but it would not affect the legal question under consideration.

For instance in the case of *State ex rel. Summerfield v Taylor*, *supra*, the Supreme Court for the first time declared that counties are not subje^t to garnishment, but there was no such decision at the time the judgment was rendered which was held void by the decision. In this case the court declared the law. The decision was not necessary to make the law. It was the law before the decision was made;

and although the law may have been doubtful before the decision, and the court rendering the garnishment judgment may have considered the matter and determined that it had jurisdiction to render such judgment, yet it was void, although we were not certain that it was void until the Supreme Court had finally spoken on the matter. In other words the decision in the case cited was retroactive and affected judgments rendered before the decision was given.

The same thing is true of the case of *Granham v Mayor etc.* of San Jose, 24 Cal. 585. In fact this argument applies practically to all cases where one judgment has been held void by another judgment.

In this way even a judgment of the Supreme Court was held void by a subsequent judgment of the same court.

Horan v Wahrensberger, 9 Tex. 313.
Collateral Attach., Van Fleets, sec. 77.

The decision of the Supreme Court in the case of the German-American Savings Bank v Spokane, 17 Wash. 315, was ample notice to every one not to rely on any decision made on the subject of street grade warrants that is not in harmony with such decision. If there had been no decision at all on the question, the decision of the court in the case at bar would affect the Elliott judgment just the same, and if this court would come to the conclusion that it was a jurisdictional matter, the Elliott judgment would fall.

This is the effect of all the decisions cited and it is not necessary to cite any more.

Now we admit that the decisions of the Supreme Court had been somewhat vacillatory before the decision in the German-American Savings Bank, *supra*, had been rendered, but from then on and now the law of the state is that cities are not liable for failure to collect special assessments and this was the law when the Elliott judgment was rendered.

As to the question whether the warrant was ordered at an adjourned meeting.

The law with reference to the meetings of the City Council is as follows:

"The city council together with the mayor, shall meet on the first Tuesday in January, next succeeding the date of said general municipal election, shall take the oath of office, and shall hold regular meetings at least once in each month, but not to exceed one regular meeting in each week, at such times as they shall fix by ordinance. Special meetings may be called at any time by the mayor by written notice delivered to each member at least three hours before the time specified for the proposed meeting. Provided, however, that no ordinance shall be passed or contract let or entered into or bill for the payment of money allowed, at such special meeting, or at an adjourned regular or special meeting. All meetings of the city council shall be held within the corporate limits of the city at such place as may be designated by ordinance, and shall be public."

By ordinance No. 585. Defendants Ex. 2. Record p 90, the time of the regular meetings of the City Council is fixed for the first and third Tuesday of each month, the hour varying in the different months of the year.

The court has decided by the decision handed down that the warrant in suit was not ordered at an adjourned meeting, but concludes that it was ordered at a regular meeting which commenced on Feb. 15, and was continued on the 16th, and then again on the 17th, still calling it the regular meeting of the 15th. This seems to me utterly incompatible with the law and ordinance just set forth.

In the first place, the court should notice that there is in the law even a prohibition against holding more than one regular meeting a week, though it be with the sanction of an ordinance. If they can adjourn from day to day and keep in session three days, there is nothing to keep them from being in session the whole week, and if they can remain in session the whole week, what does the prohibition against holding more than one regular meeting a week mean?

It will be noticed that the statute uses the phrase "or at an *adjourned regular* or special meeting. The phrase "*adjourned, regular or special meeting*" stands for a certain idea, and it is a well known principle of statutory construction that if possible a meaning should be given to every word in the statute.

26 Am. & Eng. Enc. 618.

If the meeting under consideration held on Feb. 17, 1898, was not an adjourned meeting, what is an adjourned meeting?

The court by its decision has simply cut this part of the prohibition from the statute. The city council consists of a body of men of limited powers. They are the agents of the tax payers, and the tax payers have defined their authority and limited their power by public law. The person dealing with them is bound to know the limitation on their authority at his peril. If the tax payers in this particular instance have not succeeded in protecting themselves against such acts as are shown by this record, then it is difficult to see how they can protect themselves and still allow the council to do business for them.

In this connection, the court on page 15 and 16 says: "But an adjournment from day to day does not bring the session to a close. It may terminate the meeting, but not the session. Adjournments taken from day to day, or even to a day certain, do not interrupt the business of the session. It proceeds as of the same session. Roberts Rules of Order."

We may take it for granted that an adjournment applied to a body whose sitting is termed a session, does not terminate the session. But we are not applying it in this law to a session but to a meeting, and a meeting at that which is to be held according to law and ordinance on a certain day. Remember

that it is the adjournment to which the prohibition applies. The City Council, according to law and ordinance, meet on a certain day at an hour specified. The law does not contemplate a session from day to day, and even if it did, the law clearly prohibits them from doing certain business after an adjournment and before the next regular meeting. It uses the words "adjourned, regular or special meeting." If they once meet in regular session and then adjourn to another day, although they may call it a recess, when they meet again according to adjournment, their meeting is an adjourned meeting.

The court further says: "In the present case the council met at a regular meeting, and, finding itself unable to complete or transact the business in hand"; and again further on, "we are disposed to believe that an adjournment from day to day, when impelled by business in hand," etc.

There is nothing in the record to show that they were "unable to complete or transact the business in hand". This is a pure inference by the court. The lower court simply found as a fact that the council continued its sessions upon the two succeeding days.

On page ten the court says: "There is no evidence in the record, showing that the City of Port Townsend was indebted beyond its statutory limitations at the time the indebtedness was incurred for the local street improvements in question, although the answer alleges facts showing that such was the case."

The court is in error as to what the answer alleges. The answer does not allege that the city was indebted beyond the limit at the time of constructing the local improvement, but the answer does allege that such debt limit had been exceeded in 1898, when the warrant was issued about ten years after the construction of said local improvement.

I wish to call the court's attention especially to the fact that all the allegations of the answer with reference to the debt limit are admitted by a failure to deny, so that no evidence was required on this point. In fact all the allegations of the third defense in the answer (Record p 33) with reference to the amount of warrants that were issued, the manner in which they were issued, the amount outstanding, that the voters never ratified the incurring of said indebtedness, that the city allowed a certain amount of street grade warrants to go to judgment by default and that afterwards the city ceased this policy and did not allow any more street grade warrants to go to judgment, and a number of other things alleged in paragraphs 2, 3 and 4 of said third affirmative defense are admitted by a failure to deny. The allegation that the appeal was properly taken from the Elliott judgment was denied, but this was clearly proved on the trial and the court so found. (Record p 61, 3rd finding.) Defendants asked the court to make findings covering the admitted facts in this third defense and the facts proved by the evidence that were denied in the reply thereto, but the court

refused to do so, and this is properly assigned as error. See defendant's proposed findings 10, 11 and 12, pp 55 and 56; 17th, 18th and 19th Assignment of Errors, Record. pp 119 and 120.

I will ask the court to read these proposed findings or the third affirmative defense and the reply thereto together with the proofs taken on the issues raised thereby, and consider it in connection with the other facts proved and admitted in the case, and see if there is not such a state of facts disclosed as would convince any one that "fraud" is the only word that will explain it. The record discloses the fact that at the "adjourned meeting" of the City Council held on Feb. 17, 1898, they issued over \$65,000 of warrants (see plaintiff's Ex. A, p 70) all based on claims which the Supreme Court had decided was not a liability against the city, practically the full amount of the constitutional debt limit of 5 per cent. There was an appeal pending from the Elliott judgment, and so far as the warrant in suit is concerned, it was issued voluntarily. The appeal taken had operated as a stay. There was no immediate necessity for issuing it, and it was the same with the other warrants ordered. A simple notice of an appeal served and filed without a cent of expense would have operated as a stay of all the judgments. Had they simply sent the judgment roll to the Supreme Court in the Elliott case together with the notice of appeal, the Supreme Court would have done the same thing that they did in the case of *Doxy v Port Townsend*, 21 Wash. 707, cited in defendant's brief. In the *Doxy* case, a judg-

ment by **default** had been taken against the city on a street grade warrant. The opinion of the Supreme Court is as follows:

“Upon authority of *German-American Savings Bank v Spokane*, 17 Wash. 315, the judgment of the Superior Court is reversed.”

The City Council is acting only in a representative capacity; they have such powers as are given to them expressly and such as are fairly implied from those expressly granted and no others. This is elementary law, and it is not necessary to cite authorities. Yet by their acts, and at a time expressly prohibited by statute, they place the city in debt practically to the full amount allowed by the constitution. The tax payers must and ought to have some way of protecting themselves.

If one reads the minutes of the City Council with reference to the issuing of these warrants (Plaintiffs Ex. A, B and C, pp 70 to 76) the unsophisticated might conclude that it was the members of the City Council that were on the anxious seat, and that the judgment creditors were indifferent to what the actions of the council might be, but if one stops to consider for a moment and remembers that they had only the judgment of the Superior Court, that one case was actually pending on appeal and the time for appeal in the other cases just beginning to run, that these judgment creditors were all represented by good lawyers, and must have known what show their judgments had before the Supreme Court, one can

easily imagine that it was the judgment creditors that were really the anxious ones, and that it was they, the judgment creditors, who could not wait till the next regular meeting of the council to have their warrants issued.

We submit that this judgment should be reversed because plaintiff has not shown the treasurer to be in funds out of which payment of the warrant in suit can be forced.

Because the warrant in suit is void, because issued in satisfaction of a judgment void for want of jurisdiction of the subject matter, void because issued at an adjourned meeting of the City Council against an express statutory prohibition, and void because issued under such circumstances as to make it fraudulent.

This is an important case to the city; it may involve not only three thousand dollars, but a hundred thousand dollars—one and one-half times the constitutional debt limit of the city as fixed by the constitution of the state. And if the court has the slightest doubt on any of the points raised, this petition should be granted and the cause set down for re-argument.

Respectfully submitted,

U. D. GNAGEY,

Attorney for Plaintiffs in Error.

United States
Circuit Court of Appeals
For the Ninth Circuit.

WILD GOOSE MINING & TRADING COMPANY,
a Corporation,
Appellant,

VS.

THE MIOCENE DITCH COMPANY, a Corporation,
and CAMPION MINING & TRADING COMPANY,
a Corporation,
Appellees.

Transcript of Record.

Upon Appeal from the United States District Court for the
District of Alaska, Second Division.

FILED

SEP 17 1912

No. 2174

United States
Circuit Court of Appeals
For the Ninth Circuit.

WILD GOOSE MINING & TRADING COMPANY,
a Corporation,
Appellant,

VS.

THE MIOCENE DITCH COMPANY, a Corporation,
and CAMPION MINING & TRADING COMPANY,
a Corporation,
Appellees.

Transcript of Record.

Upon Appeal from the United States District Court for the
District of Alaska, Second Division.

INDEX TO PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

	Page
Amended Answer of Campion Mining and Trading Company.....	23
Answer of Campion Mining and Trading Company.....	10
Answer of T. A. Campion.....	18
Answer to Amendment of Complaint.....	73
Answer to Second Supplemental Complaint....	83
Answer to Supplemental Complaint.....	68
Assignment of Errors.....	123
Attorneys of Record.....	1
Bill of Exceptions to Order Refusing Leave to the Wild Goose Mining and Trading Company, a Corporation, to Intervene in This Action.....	1
Bond on Appeal.....	126
Citation.....	132
Clerk's Certificate to Transcript of Record....	131
Complaint.....	2
Demurrer to Complaint.....	9
Demurrer to Petition in Intervention.....	115
Demurrer to Petition in Intervention.....	116
Memorandum Re Setting of Cases for Trial...	91

ii *Wild Goose Mining and Trading Company*

Index.	Page
Minutes—October 30, 1911.....	86
Minutes—February 5, 1912.....	87
Minutes—February 10, 1912.....	88
Minutes—April 1, 1912.....	88
Minutes—April 5, 1912.....	89
Minutes—April 6, 1912.....	90
Minutes—April 13, 1912.....	90
Minutes—April 15, 1912.....	91
Minutes—April 20, 1912.....	98
Minutes—April 27, 1912.....	99
Minutes—May 4, 1912.....	118
Minutes—May 8, 1912.....	119
Minutes—May 25, 1912.....	120
Minutes—June 1, 1912.....	121
Minutes of Trial—April 15, 1912.....	91
Minutes of Trial—April 16, 1912.....	97
Order Approving Bond on Appeal.....	125
Order Approving, etc., Bill of Exceptions.....	122
Order Extending Time for Filing, etc., Trans- script on Appeal.....	129
Petition for an Order Allowing Appeal.....	125
Petition in Intervention.....	100
Praecipe for Transcript on Appeal.....	130
Recital Re Withdrawal of William A. Gilmore, as Counsel for Defendants.....	87
Recital Re Withdrawal of Ira D. Orton, as At- torney.....	86
Reply.....	20
Reply.....	77
Reply to Second Amended Answer of Campion Mining and Trading Company.....	53

Index.	Page
Second Amended Answer of Campion Mining and Trading Company.....	39
Second Supplemental Complaint.... ..	81
Stipulation for Amendment of Complaint.....	70
Stipulation Re Testimony, etc.....	84
Supplemental Complaint.....	62

Attorneys of Record.

W. H. METSON, San Francisco, California,

G. J. LOMEN, Nome, Alaska,

Attorneys for Plaintiff.

GEO. D. SCHOFIELD, Nome, Alaska,

Attorney for Defendant Campion Mining
and Trading Company.

ELWOOD BRUNER, Nome, Alaska,

Attorney for Petitioner in Intervention.

*In the District Court for the District of Alaska,
Second Division.*

MIOCENE DITCH COMPANY, a Corporation,
Plaintiff,

vs.

CAMPION MINING & TRADING COMPANY, a
Corporation,
Defendant.

**Bill of Exceptions to Order Refusing Leave to the
Wild Goose Mining and Trading Company, a
Corporation, to Intervene in This Action.**

BE IT REMEMBERED, that the plaintiff and
defendant herein filed the following pleadings and
papers herein, all of which are set forth in words and
figures as follows: [1*]

*Page-number appearing at foot of page of original certified Record.

*In the United State District Court, for the District of
Alaska, Second Division.*

MIOCENE DITCH COMPANY, a Corporation,
Plaintiff,

vs.

T. A. CAMPION and the CAMPION MINING
and TRADING COMPANY, a Corporation,
Defendants.

Complaint.

Plaintiff complains of the defendants and for
cause of action, alleges:

I.

That plaintiff is now, and ever since the 27th day
of February, 1902, has been, a corporation organized
and existing under and by virtue of the laws of the
State of California, and is now, and ever since the
month of June, 1902, has been, engaged in business
and authorized to do business in the District of
Alaska. That the Campion Mining and Trading
Company is and was at the time of the commission
of the wrongful acts hereinafter alleged a corpora-
tion engaged in business in Alaska.

II.

That in and by its charter and articles of incor-
poration, the plaintiff corporation was, and is, au-
thorized and empowered, among other things, to own
and operate mines and mining claims within the Dis-
trict of Alaska, to own and appropriate water, and
water rights, and to build canals, ditches, flumes and
aqueducts, and to lay pipes for supplying its mines

with water and for the general use of the public in the District of Alaska, and plaintiff corporation has ever since the month of June, 1902, been continuously engaged in said business.

III.

That Nome and Snake rivers are and were, at all times herein [2] mentioned, natural watercourses, having their sources in the Sawtooth range of mountains, and emptying into the Bering Sea, being each approximately fifty miles in length, and running in the same general direction, and said rivers and their tributaries do now, and have at all times herein mentioned, flown through the unsurveyed public lands of the United States. That placer gold in paying quantities was discovered by the miners upon Snake and Nome rivers and their tributaries, in the fall of the year 1898, and thereafter, during the year 1898, and subsequent years, several thousand persons in number came into the country comprising the watershed of said two streams and located and appropriated placer claims and engaged in mining the same. That most of said placer claims embraced in the region aforesaid cannot be profitably mined except with large volumes of water under pressure, and it at once became, and now is, the custom among the miners in said region, to divert the waters of the natural streams in said region, and to carry the same in ditches, flumes and pipe-lines to be used in mining said placer claims. That by the customs of miners within said region, and all other mining regions of the District of Alaska, it has become established that the prior appropriator of the waters of a stream flow-

ing through the regions is entitled to the prior use of the same.

IV.

That plaintiff is the owner of, by virtue of prior location, appropriation and diversion made by it and its grantors, of all the waters of Nome river to the extent of three thousand miner's inches, measured under a four-inch pressure (3,600 cubic feet per minute), which plaintiff has diverted by means of a ditch flume and pipe-line, the intake of which is on said Nome river at a point on the right limit thereof about five hundred feet below the mouth of Buffalo Creek.

V.

That plaintiff and its grantors, for the purpose of using said water for mining purposes, had, long prior to the wrongful acts [3] of defendants, hereinafter alleged, diverted and carried all the said waters of Nome river from the intake aforesaid to the extent of two thousand one hundred miner's inches in a ditch, flume and pipe-line, a distance of more than thirty miles, and prior to the wrongful acts of defendants hereinafter alleged, plaintiff was actually engaged in using all the said waters of Nome river so diverted and carried to the extent aforesaid, partly in mining upon placer mining claims owned or leased by it, and partly farming the same out for hire, to be used for mining purposes. That plaintiff is now actually engaged in enlarging its said ditch, flume and pipe-line to a capacity of three thousand miner's inches.

VI.

That on or about the 23d day of July, 1904, the defendants wrongfully and unlawfully diverted from Buffalo creek, a tributary of said Nome river, coming in above plaintiff's intake, all of the waters of said Buffalo creek, varying from four hundred to one thousand miner's inches of water which would otherwise flow down and into plaintiff's ditch, flume and pipe-line, and wrongfully and unlawfully carried the same around and below plaintiff's said intake and its said ditch, flume and pipe-line, and deprived the plaintiff of the use of the same; that since the morning of August 3d, 1904, the said defendants have continuously so diverted and carried around and below plaintiff's said intake and ditch, flume and pipe-line, all the waters of said Buffalo creek, and are now actually so doing.

VII.

That by reason of the said wrongful diversion of the waters of said Buffalo creek by the defendants, the amount of water in Nome river at plaintiff's intake has been, and is now actually reduced in volume so that the same does not now exceed four hundred miner's inches, and by reason thereof plaintiff has been compelled to discontinue a large part of its mining operations, and has been and is now being irreparably damaged and injured. [4]

VIII.

That the value of the use of the waters of said Nome river which have been so wrongfully and unlawfully diverted away from plaintiff by the defendants, is and was, at all the times the same were so

diverted, far in excess of one thousand dollars per day.

IX.

That defendants threaten to, and will, unless restrained by this Honorable Court, continue to so wrongfully and unlawfully divert and carry away from plaintiff the waters of said Buffalo creek which would otherwise flow down Nome river into plaintiff's ditch, flume and pipe-line, to the irreparable damage of plaintiff.

X.

That plaintiff has no adequate remedy at law for the wrongful acts of defendants hereinbefore alleged, and are remediless in the premises except by an injunction to be issued herein restraining the defendants from the wrongful diversion of the waters of Buffalo creek herein complained of.

WHEREFORE, plaintiff prays—

1. That an order to show cause be made and issued herein ordering and directing the defendants to show cause before this Court, at a convenient day to be named therein, why an injunction should not be ordered and issued herein, restraining and enjoining the defendants, during the pendency of this action, from diverting from, or away from Buffalo creek, any of the waters thereof in such a manner as to lessen the present supply of plaintiff at its intake on Nome river to less than two thousand miner's inches; that in the meantime, and until the hearing of said order to show cause, the defendants be so restrained, and that upon the final hearing said injunction be made perpetual.

2. That it be adjudged and decreed that plaintiff is now the owner by prior appropriation and diversion of the waters of Nome river to the extent of two thousand one hundred miner's inches (twenty-four hundred cubic feet per minute) to be diverted at its intake [5] on Nome river about five hundred feet below the mouth of Buffalo creek, and that it be further adjudged that in case said plaintiff's ditch, flume and pipe-line be completed with reasonable diligence to a capacity of three thousand miner's inches, that plaintiff's prior right and ownership shall extend to said amount.

3. That an accounting be taken of the damages sustained by plaintiff by reason of the wrongful diversion by defendants of said waters as herein alleged, and that plaintiff have judgment for such sum as may be found due on said accounting.

4. For all other relief to which plaintiff may be in equity entitled, including costs.

W. H. METSON,
IRA D. ORTON,
Attorneys for Plaintiff.

United States of America,
District of Alaska,—ss.

J. M. Davidson, being first duly sworn, deposes and says, that he is the President of plaintiff corporation; that he has read the above and foregoing complaint and knows the contents thereof, and the same is true of affiant's own knowledge.

J. M. DAVIDSON.

8 *Wild Goose Mining and Trading Company*

Subscribed and sworn to before me this 8th day
of August, 1904.

[Seal]

JAS. W. BELL,

Notary Public in and for District of Alaska.

United States of America,

District of Alaska,—ss.

W. L. Leland, being first duly sworn, deposes and
says, that he is the agent of said plaintiff corporation
duly appointed pursuant to law upon whom service
of process may be made; that he has read the above
and foregoing complaint and knows the contents
thereof, and the same is true of affiant's own knowl-
edge.

W. L. LELAND.

Subscribed and sworn to before me this 8th day
of August, 1904.

[Seal]

G. B. BRUBAKER,

Notary Public in and for District of Alaska.

[Endorsed]: Filed in the Office of the Clerk of the
U. S. Dist. Court, Alaska, Second Division, at Nome,
Alaska. Aug. 8, 1904. Geo. V. Borchsenius, Clerk.
By G. J. L. [6]

*In the United States District Court in and for the
District of Alaska, Second Division.*

No. 1176.

MIOCENE DITCH COMPANY, a Corporation,
Plaintiff,

vs.

T. A. CAMPION and the CAMPION MINING &
TRADING COMPANY, a Corporation,
Defendants.

Demurrer to Complaint.

Come now the defendants above named and demur
to plaintiff's complaint upon the grounds and for
the reasons:

I.

That the Court has no jurisdiction of the subject
of the action stated and set forth in the complaint.

II.

That several causes of action have been improperly
united in said complaint.

III.

That the complaint does not state facts sufficient
to constitute a cause of action.

WILLIAM A. GILMORE,
Attorney for Defendants.

Service of a copy of within and foregoing de-
murrer acknowledged this 26th day of September,
A. D. 1904.

IRA D. ORTON,
Of Attorneys for Plaintiff.

[Endorsed]: Filed in the Office of the Clerk of the U. S. Dist. Court, Alaska, Second Division, at Nome, Alaska. Sept. 26, 1904. Geo. V. Borchsenius, Clerk. By Jno. H. Dunn, Deputy Clerk. [7]

*In the United States District Court in and for the
District of Alaska, Second Division.*

#1176.

MIOCENE DITCH COMPANY, a Corporation,
Plaintiff,

vs.

T. A. CAMPION and the CAMPION MINING &
TRADING COMPANY, a Corporation,
Defendants.

Answer of Campion Mining & Trading Company.

Comes now the Campion Mining & Trading Company, a corporation, one of the defendants above named, and for answer to the plaintiff's complaint, alleges as follows:

1.

Answering paragraph two of plaintiff's complaint, defendant alleges that it has no knowledge of the facts therein alleged and contained, and therefore upon information and belief denies each and every allegation therein contained.

2.

Answering paragraph four of plaintiff's complaint, defendant denies each and every allegation therein contained, and the whole thereof.

3.

Answering paragraph five of plaintiff's complaint,

defendant denies each and every allegation therein contained, and the whole thereof.

4.

Answering paragraph six of plaintiff's complaint, defendant denies each and every allegation therein contained, and the whole thereof, excepting what is hereinafter generally admitted in defendant's affirmative answer.

5.

Answering paragraphs seven, eight, nine and ten of plaintiff's [8] complaint, defendant denies each and every allegation therein contained, and the whole thereof.

And for an affirmative answer to plaintiff's complaint, defendant alleges:

I.

That the defendant, *Campion Mining & Trading Company*, a corporation, is now, and ever since the 6th day of March, 1903, has been a corporation organized and existing under and by virtue of the laws of the State of South Dakota, and is now, and ever since said date has been engaged in business and authorized to do business in the District of Alaska.

II.

That by its Charter and Articles of Incorporation said defendant, *Campion Mining & Trading Company*, was and is authorized and empowered, among other things, to own and operate mines and mining property within the District of Alaska; to own, operate and hold water and water rights, and to build and control ditches, flumes and aqueducts, and to lay pipes and flumes for supplying its mines and mining

property with water, and for the general use of the public in said District of Alaska, and said defendant has ever since said 6th day of March, 1903, been continuously engaged in said business.

III.

That Nome and Snake rivers are, and were at all times herein mentioned, natural watercourses, having their source and head tributaries in the Sawtooth Range of Mountains, and sloping towards Bering Sea, being each approximately fifty miles in length, and running in the same general direction; and said rivers and their tributaries do now flow, and have at all times herein mentioned, been flowing through the unsurveyed public lands of the United States.

That placer gold, in paying quantities, was discovered by the miners upon Snake and Nome rivers and their tributaries, in the fall of the year 1898, and thereafter during the year 1898, and in [9] subsequent years, several thousand persons in numbers, came into the country comprising the watersheds of said rivers, and located placer mining claims and engaged in mining the same; that most of said placer mining claims embraced within the region aforesaid, cannot be profitably mined and operated except with a large volume of water under pressure, and it at once became, and now is the custom among the miners in said region, to divert the waters of the natural streams in said region, and to carry the same in ditches, flumes and pipe-lines, to be used in mining said placer ground; that by the customs of the miners in said region, and all other regions of the District of Alaska, it has become established that the

person making the prior location, appropriation and diversion of the waters of a stream flowing through the region above described, is entitled to the prior use of the same.

IV.

That Deep Canyon creek, Buffalo creek, Divide creek and Dorothy creek, form the head tributaries or headwaters of said Nome river.

V.

That during the summer of 1900, defendant and its grantors and predecessors in interest, located and appropriated all of the waters flowing in said Buffalo creek, at a point on said creek about one mile above the mouth thereof, and during said year 1900, built and constructed a dam on said creek, and diverted all of the water flowing in the channel of said creek by means of a ditch commencing at said dam; that said water was located, appropriated and diverted for the purpose of being conveyed, carried and taken by means of a ditch and pipe-line, to the placer mining ground above described, and there to be sold or "farmed" out to the miners in the locality for mining purposes; and also, to be used by the defendant and its predecessors in interest on said Dorothy creek and other creeks, in mining and hydraulicking mining ground owned and controlled by the defendant under [10] the level or line of its said ditch.

VI.

That the defendant and its grantors and predecessors in interest have ever since said year 1900 been

14 *Wild Goose Mining and Trading Company*

engaged in constructing and building their said ditch and pipe-line from said dam or intake on said Buffalo creek, and are now engaged in extending and completing the same for the purposes hereinbefore set forth, as diligently as possible, the weather and season of the year permitting, and that the carrying capacity of said ditch, when completed, will be far in excess of all the waters flowing in said Buffalo creek at the head or intake of said ditch.

VII.

That the purposes for which said water was located, appropriated and diverted by the defendant, its grantors and predecessors in interest, as aforesaid, were and are reasonable, necessary, useful and not wasteful.

VIII.

That the location, appropriation and diversion of all the waters of said Buffalo creek by the defendants, its grantors and predecessors in interest, was long prior in time and right to the alleged location, appropriation and diversion of the waters of Nome River by the plaintiff.

IX.

That by reason of said location, appropriation and diversion above described, the defendant is now the owner and entitled to the possession and use of all of the waters flowing in said stream.

And for a further, second and affirmative answer to the plaintiff's complaint, defendant alleges:

I.

Defendant repeats and reaffirms paragraphs I, II, III and IV of its first affirmative answer, as para-

graphs I, II, III and IV of this further, second and affirmative answer to plaintiff's complaint. [11]

V.

That said defendant is now, and it and its grantors and predecessors in interest were, at all the times mentioned in plaintiff's complaint, the owners in fee of most all of the mineral ground on the headwaters of said Nome River, including the said Buffalo creek, Dorothy creek and Divide creek, and the ground on either side of and including the bed of Nome river between said Buffalo creek and Dorothy creek, and it and its grantors and predecessors in interest, have been in the continued and uninterrupted possession thereof, long prior to the times hereinbefore mentioned. That the greater part of said placer mining ground above described, lies below said Buffalo creek, and comprises an area of about 6,000 acres of mineral-bearing ground valuable for the native gold contained within the auriferous gravel thereof.

VI.

That the defendant is the owner of by virtue of a prior location, appropriation and diversion, made by it and its grantors, of all of the waters of said Buffalo creek, to the extent of all the waters in said stream, running in the channel of said stream; that said defendant and its grantors, long prior to the alleged location and appropriation of the plaintiff on said Nome river, mentioned in its complaint, had located, appropriated, diverted and used all the water running and flowing in said Buffalo creek at a point about one-fourth of a mile above its mouth, for mining purposes on Dorothy creek, and the placer ground

on the limits of said Nome river.

That after locating, appropriating and diverting the waters of said Buffalo creek, the defendant and its grantors as rapidly as possible, constructed from its intake on said Buffalo creek, a ditch and pipe-line, through its said placer mining ground, to said Dorothy creek, a distance of about eight miles; that during the construction of said ditch and pipe-line, defendant conducted mining operations on its placer ground on the right limit of Nome river, near Divide creek, [12] using the waters of said Buffalo creek for hydraulicking.

That while so engaged and employed in said work the defendant, by deed, granted the plaintiff an easement, or right of way, across its said placer ground, below the level and line of defendant's ditch, for the plaintiff to build what is known as the Nome river extension of plaintiff's Hobson creek ditch; that plaintiff accepted said right of way and constructed said extension thereafter with full knowledge of defendant's ownership, control and prior right to all of said waters of said Buffalo creek, and the other head tributaries of said Nome river; that at the time of said grant, and long prior to the time plaintiff made any diversion, appropriation or use of any of the waters of said Nome river, and long prior to plaintiff's completion of said Nome river extension ditch, plaintiff assisted and aided the defendant in its construction of said Buffalo Dorothy creek ditch and pipe-line, commonly known as the Campion lower ditch.

That by virtue of said grant, and by virtue of said

acts of plaintiff, the plaintiff is now estopped from asserting any claim of title to any of the waters of said Buffalo creek in the possession, use and control of the defendant.

VII.

That by reason of said location, appropriation, diversion, and use of the waters of said Buffalo creek, as above set forth, the defendant is the owner and entitled to the possession of all of said water.

Wherefore, defendant prays that the plaintiff take nothing by its complaint, and that the defendant have and recover its costs and disbursements.

WILLIAM A. GILMORE,
Attorney for Defendant.

United States of America,
District of Alaska,—ss.

William A. Gilmore, being first duly sworn, deposes and says: [13]

That he is the attorney for the answering defendant, Campion Mining & Trading Company, a corporation; that he prepared the foregoing answer, and knows the contents thereof, and that the same is true as he verily believes.

That he makes this verification for the defendant for the reason that all of the officers and agents who could make this verification for the defendant are now without the District of Alaska, and without the jurisdiction of the above-entitled court.

WILLIAM A. GILMORE.

18 *Wild Goose Mining and Trading Company*

Subscribed and sworn to before me, this 4th day of April, 1905.

[Seal]

J. W. ALBRIGHT,

Notary Public, District of Alaska.

Received a copy of the above and foregoing answer, this 4th day of April, 1905.

Of Attorneys for Plff.

[Endorsed]: Filed in the Office of the Clerk of the U. S. Dist. Court, Alaska, Second Division, at Nome, Alaska. Apr. 5, 1905. Geo. V. Borchsenius, Clerk. By Angus McBride, Deputy Clerk. [14]

*In the United States District Court in and for the
District of Alaska, Second Division.*

#1176.

MIOCENE DITCH COMPANY, a Corporation,
Plaintiff,

vs.

T. A. CAMPION and the CAMPION MINING &
TRADING COMPANY, a Corporation,
Defendants.

Answer of T. A. Campion.

Comes now the above-named defendant, T. A. Campion, and for answer to plaintiff's complaint, alleges as follows:

1.

He denies each and every allegation therein contained, and the whole thereof, save and except paragraph one of plaintiff's complaint, and disclaims any

right, title, interest or estate in himself, in and to any of the waters of said Buffalo creek, mentioned in plaintiff's complaint, other than the fact that he is the manager of defendant Campion Mining & Trading Company, a corporation, and a stockholder thereof.

WILLIAM A. GILMORE,
Attorney for Defendant.

United States of America,
District of Alaska,—ss.

William A. Gilmore, being first duly sworn, deposes and says: That he is the attorney for said defendant in the above-entitled action, and as such states that he prepared the above and foregoing answer, and is familiar with the contents thereof, and believes the same to be true.

That he makes this verification for said defendant, for the reason that said defendant is now without the District of Alaska, and without the jurisdiction of the above-entitled court.

WILLIAM A. GILMORE.

Subscribed and sworn to before me this 4th day of April, 1905.

[Seal]

J. W. ALBRIGHT,
Notary Public in and for the District of Alaska.

Rec'd. copy of above answer this 4th day of April, 1905.

Atty. for Plff.

[Endorsed]: Filed in the Office of the Clerk of the U. S. Dist. Court, Alaska, Second Division, at Nome,

Alaska. Apr. 5, 1905. Geo. V. Borchsenius, Clerk.
By Angus McBride, Deputy Clerk. L. [15]

*In the United States District Court in and for the
District of Alaska, Second Division.*

MIOCENE DITCH COMPANY, a Corporation,
Plaintiff,

vs.

T. A. CAMPION and the CAMPION MINING &
TRADING COMPANY, a Corporation,
Defendants.

Reply.

Comes now, the plaintiff in the above-entitled cause and for reply to the affirmative answer of the defendants herein,

1.

Denies all and singular each and every allegation contained in paragraphs numbered 5, 6, 7, 8 and 9 of said affirmative answer and defense.

And for reply to defendants' second and further answer to plaintiff's complaint, plaintiff

1.

Denies all and singular each and every allegation contained in paragraphs numbered 5, 6 and 7 of said further, second and affirmative answer to plaintiff's complaint.

As a further, separate and affirmative reply to defendants' affirmative answer to plaintiff's complaint, and defendants' further, second and affirmative answer to plaintiff's complaint, plaintiff alleges:

1.

That ever since the discovery of gold in the Cape Nome Mining District, District of Alaska, in the year 1898, there has been and now is a rule, regulation, custom and local law with reference to the location and appropriation of water for mining or other purposes in said district, under and by virtue of which said local law, regulation, [16] rule and custom it was and is necessary as part of the act of location and appropriation for the locator and appropriator of said water and water right to file, within a reasonable time, in the recorder's office for the mining district within which said right is situate, a record notice of his location and appropriation of said water or water right, and this said local law, regulation, rule and custom has always been and is now generally recognized and acknowledged, and has always been and now is universally followed and adhered to by all persons in said mining district.

2.

That by the provisions of the aforesaid local law, rule, regulation and custom, a person failing to comply with the requirements of the aforesaid regulation, rule, local law and custom in relation to recording as hereinbefore set out, loses and forfeits all and singular any right or rights to any water or water right by him attempted to be located or appropriated.

3.

That defendant and its predecessors in interest utterly failed and neglected to file for record any notice whatsoever or make or cause to be made any

record notice whatsoever of their alleged and pretended location and appropriation of the waters of Buffalo creek, in their said answer specified, prior to the — day of September, 1902.

4.

That long prior to the said defendant Campion Mining & Trading Company, its grantors or predecessors in interest, filing in the office of the recorder for the Cape Nome Mining District or the Cape Nome Recording District, District of Alaska, of any notice or certificate of location of any water right on Buffalo creek, and long prior to the said Campion Mining & Trading Company, or its grantors or predecessors in interest, making any record in the said office or offices claiming any of the waters of said Buffalo creek, the plaintiff [17] and its grantors and predecessors in interest had located and appropriated the waters of Nome river to the extent set forth in their complaint herein, and were proceeding with reasonable diligence to build and construct a ditch, flume and pipe-line to divert, operate and use the same for mining and other useful and beneficial purposes; which said ditch, flume and pipe-line was thereafter with reasonable diligence completed as in said complaint alleged.

WHEREFORE, plaintiff having replied to the answer of defendants prays judgment as prayed for in the complaint.

W. H. METSON,
IRA D. ORTON,
ALBERT FINK,
Attorneys for Plaintiff.

United States of America,
District of Alaska,—ss.

Ira D. Orton, being first duly sworn, deposes and says: That he is one of the attorneys for the plaintiff in the above-entitled action; that affiant has read over the foregoing reply and believes the same to be true; that the reason why this verification is made by affiant instead of an officer of plaintiff corporation is because said officers are not present within the District of Alaska, and for that reason are unable and incapable of verifying the same.

IRA D. ORTON.

Subscribed and sworn to before me this 5th day of June, 1905.

[Seal] L. F. THOMAS,
Notary Public in and for the District of Alaska.

[Endorsed]: Filed in the Office of the Clerk of the U. S. Dist. Court, Alaska, Second Division, at Nome, Alaska. June 5, 1905. Geo. V. Borchsenius, Clerk. By Jno. H. Dunn, Deputy Clerk. [18]

*In the United States District Court for the District
of Alaska, Second Division.*

No. 1176.

MIOCENE DITCH COMPANY, a Corporation,
Plaintiff,

vs.

T. A. CAMPION and the CAMPION MINING &
TRADING COMPANY, a Corporation,
Defendants.

Amended Answer of Campion Mining & Trading Company.

Comes now the Campion Mining & Trading Company, a corporation, one of the defendants above-named, and for answer to the plaintiff's complaint, alleges as follows:

1.

Answering paragraph two of plaintiff's complaint, defendant alleges that it has no knowledge of the facts therein alleged and contained, and therefore upon information and belief denies each and every allegation therein contained.

2.

Answering paragraph four of plaintiff's complaint, defendant denies each and every allegation therein contained, and the whole thereof.

3.

Answering paragraph five of plaintiff's complaint, defendant denies each and every allegation therein contained, and the whole thereof.

4.

Answering paragraph six of plaintiff's complaint, defendant denies each and every allegation therein contained, and the whole thereof, excepting what is hereinafter generally admitted in defendant's affirmative answer.

5.

Answering paragraphs seven, eight, nine and ten of plaintiff's [19] complaint, defendant denies each and every allegation therein contained, and the whole thereof.

And for an AFFIRMATIVE answer to plaintiff's complaint, defendant alleges:

1.

That the defendant, Campion Mining & Trading Company, a corporation, is now, and ever since the 6th day of March, 1903, has been a corporation organized and existing under and by virtue of the laws of the State of South Dakota, and is now, and ever since said date has been engaged in business and authorized to do business in the District of Alaska.

2.

That by its Charter and Articles of Incorporation said defendant, Campion Mining & Trading Company, was and is authorized and empowered, among other things, to own and operate mines and mining property within the District of Alaska; to own, operate and hold water and water rights, and to build and control ditches, flumes and aqueducts, and to lay pipes and flumes for supplying its mines and mining property with water, and for the general use of the public, in said District of Alaska; and said defendant has ever since said 6th day of March, 1903, been continuously engaged in said business.

3.

That the defendant, Campion Mining & Trading Company, is now, and it and its grantors and predecessors in interest were, long prior to any attempted appropriation of the waters of Nome river or Buffalo creek, a tributary of said Nome river, on the part of the plaintiff, the owners in fee of all the mineral lands from the source to the mouth of said Buffalo creek, including the bed of said Buffalo creek

and three hundred thirty (330) feet from the center of said stream on either side thereof, in the Cape Nome Recording District, District of Alaska.

4.

That the grantors and predecessors in interest of said defendant, [20] at said time, entered upon the said ground, which was then unoccupied and unappropriated public lands of the United States of America, and located it, by definitely marking the exterior boundaries of each placer claim thereon with substantial monuments, and by posting a notice on each of said placer claims, said notice containing such a description of the claim with reference to natural objects and permanent monuments as would identify the same, the name of the claim, the date of location and the name of the locator; that at said time the said grantors and predecessors in interest of said defendant did make a discovery of gold upon each of said mining claims, and did, thereafter within ninety days of the time of making said discoveries, record a copy of each of the said notices in the office of the Recorder of the Cape Nome Recording District, District of Alaska.

5.

That the said ground above described is valuable only for the deposits of gold in the sands thereof.

6.

That the grantors and predecessors in interest of this answering defendant, did, by virtue of the acts above referred to, appropriate all the waters flowing in the channel of said Buffalo creek, as well as the

territory embraced within the boundaries of said placer locations.

7.

That the locators of said placer mining claims, did, thereafter, for a valuable consideration, transfer and convey the same to said defendant.

8.

That it will be impossible to work the said ground without a large quantity of water; and that all the waters of said Buffalo creek are necessary for mining the ground adjoining said creek, owned by this answering defendant and its grantors and predecessors in interest long prior to any attempted appropriation of the waters of said [21] Buffalo creek.

9.

That said defendant is now, and it and its grantors and predecessors in interest were, long prior to any attempted appropriation of the waters of Nome river on the part of the plaintiff, the owners in fee of all the lands from the mouth of Buffalo creek down Nome river for a distance of two miles, including the bed of said Nome river and three hundred thirty (330) feet on either side of the center thereof.

10.

That, on the 14th day of October, 1900, the grantors and predecessors in interest of said defendant, entered upon said ground above described, which was then unoccupied and unappropriated public lands of the United States of America, and located it, by definitely marking the exterior boundaries thereof with substantial monuments, and by posting a notice thereon, said notice containing such a description of

the claim with reference to natural objects and permanent monuments as would identify the same, the name of the claim, the date of the location and the name of the locator, and named said claim the "Any Old Thing" Placer Mining Claim; that at said time the said grantors did make a discovery of gold upon said claim; and did, thereafter, on the 18th day of October, 1900, cause said location notice to be recorded in the records of said Cape Nome Recording District, District of Alaska.

11.

That said grantors and predecessors in interest of this answering defendant, did, by virtue of the acts above referred to, appropriate all the waters flowing in the channel of said Nome river, as well as the territory embraced within the boundaries of said placer location.

12.

That the said locators of said placer mining claim did, thereafter, for a valuable consideration, transfer and convey the same to [22] said defendant.

13.

That the said ground above described is valuable only for the deposits of gold in the sands thereof.

14.

That it will be impossible to work the said ground without a large quantity of water; and that all the waters of said Nome river are necessary for mining the ground adjoining said river, owned by this answering defendant and its grantors and predecessors in interest long prior to any attempted appropria-

tion of the waters of said Nome river on the part of the plaintiff.

16.

That said defendant is the owner and entitled to the possession, and it and its grantors and predecessors in interest were, long prior to any attempted appropriation of the waters of Nome river on the part of the plaintiff, the owners in fee of that certain placer mining claim, situate on the right limit of Nome river, in the Cape Nome Recording District, District of Alaska, known as the "Mountain Star" claim, containing 160 acres.

17.

That the grantors and predecessors in interest of said defendant did, on the 14th day of July, 1902, enter upon said Mountain Star placer claim, which was then unoccupied and unappropriated public lands of the United States of America, and locate the same, by definitely marking the exterior boundaries thereof with substantial monuments, and by posting a notice thereon, which notice reads as follows:

"NOTICE OF LOCATION.

MOUNTAIN STAR PLACER MINING CLAIM.

(160 acres.)

NOTICE IS HEREBY GIVEN, that the undersigned, citizens of the United States, having complied with all the requirements of the Revised Statutes of the United States, and all local rules, customs and regulations, have this day located and claim the following described placer mining ground, together with all water and water rights thereon, to wit: [23]

30 *Wild Goose Mining and Trading Company*

Beginning at the initial point on the right bank of Nome river, identical with corner No. 4 of No. 1 below discovery on Divide creek; and running:

Thence north $78^{\circ} 45'$ west 1110.7 feet to corner No. 2;

Thence north $17^{\circ} 00'$ west 1100 feet to corner No. 3;

Thence north $9^{\circ} 40'$ west 575.3 feet to corner No. 4;

Thence north $11^{\circ} 30'$ west 1320 feet to corner No. 5;

Thence north $15^{\circ} 15'$ west 1427 feet to corner No. 6;

Thence north $19^{\circ} 00'$ west 731.9 feet to corner No. 7;

Thence north $16^{\circ} 00'$ west 1320 feet to corner No. 8;

Thence north $13^{\circ} 15'$ west 942.5 feet to corner No. 9;

Thence north $21^{\circ} 00'$ west 1320 feet to corner No. 10;

Thence north $82^{\circ} 50'$ west 660 feet to corner No. 11;

Thence south $16^{\circ} 12'$ east 7310.4 feet to corner No. 17;

Side stakes on every line every 1320 feet.

Thence south $39^{\circ} 00'$ east 2529.9 feet to corner No. 13;

Thence 660 feet to point of beginning, adjoining the Any Old Thing and Lucky Find claims, side lines of each being identical. (Local magnetic bearings.)

Located July 14, 1902. Surveyed July 30, 1902.

Named the 'MOUNTAIN STAR.' See map on file, together with copy of this location notice in the

records of the Cape Nome Recording District, District of Alaska.

J. C. THORN,
B. MALONE,
W. L. CAMPION,
A. JOHNSON,
BARNEY NIGGEMEYER,
CHARLIE NIGGEMEYER,
JOHN LeFEVRE,
J. B. CAMPION.

Witnesses:

E. F. LEWIS,
J. NAGLEY."

That at said time the said grantors did make a discovery of gold upon said claim, and did, thereafter, on the 8th day of October, 1902, record a copy of said notice in the office of the Recorder of said Cape Nome Mining District, District of Alaska.

18.

That said grantors and predecessors in interest of this answering defendant did, by virtue of the acts above referred to, appropriate all the waters flowing in the channel of said Nome river, as well as the territory within the boundaries of said placer location.

19.

That the said locators of said placer mining claim did, thereafter, for a valuable consideration, transfer and convey the same to said defendant.

20.

That the said ground above described is valuable

only for [24] the deposits of gold in the sands thereof.

21.

That it will be impossible to work the said ground without a large quantity of water; and that all the waters of said Nome river are necessary for mining the ground adjoining said river and included in said claim, owned by this defendant and its grantors and predecessors in interest long prior to any attempted appropriation of the waters of said Nome river on the part of the plaintiff.

22.

That said defendant used the waters of said Buffalo creek and Nome river for mining purposes upon the lands hereinbefore described long prior to any attempted appropriation of said waters on the part of the plaintiff.

And for a further, second and affirmative answer to the plaintiff's complaint, defendant alleges:

1.

Defendant repeats and reaffirms paragraphs 1 and 2 of its first affirmative answer as paragraphs 1 and 2 of this further, second and affirmative answer to plaintiff's complaint.

3.

That Nome and Snake rivers are, and were at all times herein mentioned, natural watercourses, having their source and head tributaries in the Sawtooth range of mountains, and sloping towards Bering Sea, being each approximately fifty miles in length, and running in the same general direction; and said rivers and their tributaries do now, and have at all

times herein mentioned, been flowing through the unsurveyed public lands of the United States.

That placer gold, in paying quantities, was discovered by the miners upon Snake and Nome rivers and their tributaries, in the fall of the year 1898, and thereafter during the year 1898, and in the subsequent years, several thousand persons in number, came into the country comprising the watersheds of said rivers, and located placer mining [25] claims embraced within the region aforesaid, cannot be profitably mined and operated except with a large volume of water under pressure, and it at once became, and now is the custom among the miners in said region, to divert the waters of the natural streams in said region, and to carry the same in ditches, flumes and pipe-lines, to be used in mining said placer ground; that by the customs of the miners in said region, and all other regions of the District of Alaska, it has become established that the persons making the prior location, appropriation and diversion of the unappropriated waters of a stream flowing through the region above described is entitled to the prior use of the same.

4.

That Deep Canyon creek, Buffalo creek, Divide creek and Dorothy creek, form the head tributaries of headwaters of said Nome river.

5.

That during the summer of 1900, defendant and its grantors and predecessors in interest, located and appropriated all of the waters flowing in said Buffalo creek, at a point on said creek about one

mile above the mouth thereof, and during said year 1900, built and constructed a dam on said creek and diverted all of the water flowing in the channel of said creek by means of a ditch commencing at said dam; that said water was located, appropriated and diverted for the purpose of being conveyed, carried and taken, by means of a ditch and pipe-line, to the placer mining ground above described, and there to be sold or "farmed" out to the miners in that locality for mining purposes; and also, to be used by the defendant and its predecessors in interest on said Dorothy creek and other creeks, in mining and hydraulicking mining ground owned and controlled by the defendant under the level of line of its said ditch.

6.

That the defendant and its grantors and predecessors in interest have ever since said year 1900, been engaged in constructing [26] and building their said ditch and pipe-line from said dam or intake on said Buffalo creek, and are now engaged in extending and completing the same for the purposes hereinbefore set forth, as diligently as possible, the weather and season of the year permitting, and that the carrying capacity of said ditch, when completed, will be far in excess of all the waters flowing in said Buffalo creek at the head or intake of said ditch.

7.

That the purposes for which said water was located, appropriated and diverted by the defendant, its grantors and predecessors in interest, as aforesaid, were and are reasonable, necessary, useful and not wasteful.

8.

That the location, appropriation and diversion of all of the waters of said Buffalo creek by the defendants, its grantors and predecessors in interest, was long prior in time and right to the alleged location, appropriation and diversion of the waters of Nome river by the plaintiff.

9.

That by reason of said location, appropriation and diversion above described, the defendant is now the owner and entitled to the possession and use of all of the waters flowing in said stream.

And for a further, third and affirmative answer to the plaintiff's complaint, defendant alleges:

1.

Defendant repeats and reaffirms paragraphs 1 and 2 of its first affirmative answer and paragraphs 3 and 4 of its second affirmative answer as paragraphs 1, 2, 3 and 4 of this further, third and affirmative answer to plaintiff's complaint.

5.

That said defendant is now, and it and its grantors and predecessors in interest were, at all the times mentioned in plaintiff's [27] complaint, the owners in fee of most all of the mineral ground on the headwaters of said Nome river, including the said Buffalo creek, Dorothy creek and Divide creek, and the ground on either side of and including the bed of Nome river between said Buffalo creek and Dorothy creek, and it and its grantors and predecessors in interest, have been in the continued and uninterrupted possession thereof, long prior to the

times hereinbefore mentioned. That the greater part of said placer mining ground above described lies below said Buffalo creek, and comprises an area of about 6,000 acres of mineral-bearing ground valuable for the native gold contained within the auriferous gravel thereof.

6.

That the defendant is the owner, by virtue of a prior location, appropriation and diversion, made by it and its grantors and predecessors in interest, of all of the waters of said Buffalo creek, to the extent of all the waters in said stream running in the channel of said stream; that said defendant and its grantors, long prior to the alleged location and appropriation of the plaintiff on said Nome river, mentioned in its complaint, had located, appropriated, diverted and used all the water running and flowing in said Buffalo creek at a point about one-fourth of a mile above its mouth, for mining purposes on Dorothy creek, and the placer ground on the limits of said Nome river.

That after locating, appropriating and diverting the waters of said Buffalo creek, the defendant and its grantors, as rapidly as possible, constructed from its intake on said Buffalo creek, a ditch and pipe-line through its said placer mining ground to said Dorothy creek, a distance of about eight miles; that during the construction of said ditch and pipe-line, defendant conducted mining operations on its placer ground on the right limit of Nome river, near Divide creek, using the waters of said Buffalo creek for hydraulicking.

That while so engaged and employed in said work the defendant, [28] by deed, granted the plaintiff an easement, or right of way, across its said placer ground, below the level and line of defendant's ditch, for the plaintiff to build what is known as the Nome River Extension of plaintiff's Hobson ditch; that plaintiff accepted said right of way and constructed said extension thereafter with full knowledge of defendant's ownership, control and prior right to all of said water of said Buffalo creek, and the other head tributaries of Nome river; that at the time of said grant, and long prior to the time plaintiff made any diversion, appropriation or use of any of the waters of said Nome river, and long prior to plaintiff's completion of said Nome river extension ditch, plaintiff assisted and aided the defendant in its construction of said Buffalo-Dorothy creek ditch and pipe-line, commonly known as the Campion lower ditch or Debris ditch.

That by virtue of said grant and by virtue of said acts of plaintiff, the plaintiff is now estopped from asserting any claim of title to any of the waters of said Buffalo creek in the possession, use and control of the defendant.

7.

That by reason of said location, appropriation, diversion and use of the waters of said Buffalo creek, as above set forth, the defendant is the owner and entitled to the possession of all of said water.

WHEREFORE, said defendant prays that the plaintiff take nothing by its complaint, and that said defendant be decreed to be the owner and entitled to

the possession of all the waters of said Buffalo creek; and that defendant have and recover its costs and disbursements herein.

WILLIAM A. GILMORE,
DUDLEY DU BOSE,
Attorneys for Defendant. [29]

United States of America,
District of Alaska,—ss.

B. Niggemeyer, being first duly sworn, upon oath, deposes and says: That he is the secretary of the Campion Mining & Trading Company, a corporation, the defendant in the above-entitled action; that he makes this verification on behalf of said defendant corporation; that he has read the foregoing amended answer and knows the contents thereof; and that the same is true, as he verily believes.

B. NIGGEMEYER.

Subscribed and sworn to before me, this 21st day of June, 1905.

[Seal] G. B. BRUBAKER,
Notary Public in and for the District of Alaska.

Received a copy of the above and foregoing amended complaint this 20th day of June, 1905.

IRA D. ORTON,
Of Attorneys for Plaintiff.

[Endorsed]: Filed in the Office of the Clerk of the U. S. Dist. Court, Alaska, Second Division, at Nome, Alaska. June 21, 1905. Geo. V. Borchsenius, Clerk. By Angus McBride, Deputy Clerk. [30]

*In the United States District Court for the District
of Alaska, Second Division.*

No. 1176.

MIOCENE DITCH COMPANY, a Corporation,
Plaintiff,

vs.

T. A. CAMPION and the CAMPION MINING &
TRADING COMPANY, a Corporation,
Defendants.

**Second Amended Answer of Campion Mining &
Trading Co.**

Comes now, the Campion Mining & Trading Company, a corporation, one of the defendants above named, and for answer to the plaintiff's complaint, alleges as follows:

1.

Answering paragraph two of plaintiff's complaint, defendant alleges that it has no knowledge of the facts therein alleged and contained, and therefore upon information and belief denies each and every allegation therein contained.

2.

Answering paragraph four of plaintiff's complaint, defendant denies each and every allegation therein contained, and the whole thereof.

3.

Answering paragraph five of plaintiff's complaint, defendant denies each and every allegation therein contained, and the whole thereof.

4.

Answering paragraph six of plaintiff's complaint, defendant denies each and every allegation therein contained, and the whole thereof, excepting what is hereinafter generally admitted in defendant's affirmative answer.

5.

Answering paragraphs seven, eight, nine and ten of plaintiff's [31] complaint, defendant denies each and every allegation therein contained, and the whole thereof.

And for an affirmative answer to plaintiff's complaint, defendant alleges:

1.

That the defendant, *Campion Mining & Trading Company*, a corporation, is now, and ever since the 6th day of March, 1903, has been a corporation organized and existing under and by virtue of the laws of the State of South Dakota, and is now, and ever since said date has been engaged in business and authorized to do business in the District of Alaska.

2.

That by its Charter and Articles of Incorporation said defendant, *Campion Mining & Trading Company*, was and is authorized and empowered, among other things, to own and operate mines and mining property within the District of Alaska; to own, operate and hold water rights, and to build and control ditches, flumes and aqueducts, and to lay pipes and flumes for supplying its mines and mining property with water, and for the general use of the public, in said District of Alaska; and said defendant has

ever since said 6th day of March, 1903, been continuously engaged in said business.

3.

That the defendant, *Campion Mining & Trading Company*, is now, and it and its grantors and predecessors in interest were, long prior to any attempted appropriation of the waters of Nome river or Buffalo creek, a tributary of said Nome river, on the part of the plaintiff, were the owners and in the exclusive possession of all the mineral lands from the source to the mouth of said Buffalo creek, including the bed of said Buffalo creek and three hundred thirty (330) feet from the center of said stream on either side thereof, in the Cape Nome Recording District, District of Alaska. [32]

That the grantors and predecessors in interest of said defendant, at said time, entered upon the said ground, which was then unoccupied and unappropriated public lands of the United States of America, and located it, by definitely marking the exterior boundaries of each placer claim thereon with substantial monuments, and by posting a notice on each of the said placer claims, said notice containing such a description of the claim with reference to natural objects and permanent monuments as would identify the same, the name of the claim, the date of the location and the name of the locator; that at said time the said grantors and predecessors in interest of said defendant did make a discovery of gold upon each of said mining claims, and did, thereafter, within ninety days of the time of making said discoveries, record a copy of each of the said notices in the office of the

Recorder of the Cape Nome Recording District, District of Alaska.

5.

That the said ground above described is valuable only for the deposits of gold in the sands thereof.

6.

That the grantors and predecessors in interest of this answering defendant, did, by virtue of the acts above referred to, appropriate all the waters flowing in the channel of said Buffalo creek, as well as the territory embraced within the boundaries of said placer locations.

7.

That the locators of said placer mining claims did, thereafter, for a valuable consideration, transfer and convey the same to said defendant.

8.

That it will be impossible to work the said ground without a large quantity of water; and that all the waters of said Buffalo creek are necessary for mining the ground adjoining said creek, owned by this answering defendant and its grantors and predecessors in interest long prior to any attempted appropriation of the waters of said Buffalo creek on the part of the plaintiff. [33]

9.

That, on the 14th day of October, 1900, P. F. Cummings, A. S. Kepner, Daniel Mahoney, Thomas Berry, R. J. Hanford, H. Buttel, Andrew Paul and R. J. Preston, entered upon that certain piece of ground hereinafter described, which said ground was then unoccupied and unappropriated public min-

eral lands of the United States, and located the same for placer mining purposes, by definitely marking the exterior boundaries thereof and posting a notice thereon, which said notice contained such a description of said ground with reference to natural objects and permanent monuments as would readily identify the same, the name of said claim, to wit, the "Any Old Thing" placer mining claim, the date of the location and the names of the locators; that at said time the said locators made a discovery of gold within the exterior boundaries of said claim, and did, thereafter, to wit, on the 18th day of October, 1900, cause a true and correct copy of said location notice to be recorded in the office of the recorder of the Cape Nome Recording District, District of Alaska.

10.

That the said placer mining claim "Any Old Thing" embraced all the land from the confluence of Buffalo creek and Nome river down the said Nome river for a distance of about two miles, including the bed of said Nome river and three hundred and thirty feet on each side thereof from the center of the stream, and is situated in the Cape Nome Recording District, District of Alaska.

11.

That the said locators did, by virtue of the acts above referred to, appropriate all the waters flowing in the channel of the said Nome river, as well as the territory embraced within the boundaries of said placer mining location.

12.

That the said locators of said placer mining claim

44 *Wild Goose Mining and Trading Company*

“Any Old Thing” did thereafter, to wit, on the 19th day of October, 1900, for a valuable consideration, make an oral contract with one, T. A. Campion, [34] to convey and transfer the said placer mining claim “Any Old Thing” to the said T. A. Campion.

13.

That immediately thereafter the said locators attempted to convey the said placer mining claim to said T. A. Campion by a writing, which through the ignorance of both said locators and said T. A. Campion failed to convey the legal title to said T. A. Campion; that at that time the said T. A. Campion paid to the said locators the sum of Eighty (\$80.00) Dollars lawful money of the United States, that being the full amount agreed upon between the said T. A. Campion and said locators as the purchase price of the said mining claim known as “Any Old Thing”; that the payment by the said T. A. Campion of the said Eighty (\$80.00) Dollars to the said locators was the sole and only condition to be performed by the said T. A. Campion.

14.

That immediately upon the payment of said money, the said T. A. Campion went into the exclusive occupation and possession of the said placer mining claim, as marked upon the ground by the said locators, and remained in possession of the same continuously and exclusively until the 15th day of April, 1903, when the said T. A. Campion, for a valuable consideration, conveyed by deed to this answering defendant all his right, title and interest in and to said “Any Old Thing” placer mining claim.

15.

That immediately upon the conveyance by the said T. A. Campion to this answering defendant of the said "Any Old Thing" placer mining claim, this answering defendant went into the actual occupation and possession of said claim, and ever since said time has remained, and now is in the actual occupation and possession of said placer mining claim; that the possession and occupation of said placer mining claim on the part of said T. A. Campion and this answering defendant was exclusive from said 18th day of October, 1900, to the 19th day of August, 1903, save and except the unlawful entry upon a portion of the [35] said claim by the plaintiff and one R. M. B. Tidd.

16.

That, on the 19th day of August, 1903, this answering defendant, for a valuable consideration, gave to the plaintiff a right of way for a ditch over the said placer mining claim known as "Any Old Thing," being a right of way from a point about a quarter of a mile below Buffalo creek on the right limit of said Nome river to the west side line of said claim.

17.

That from the said 19th day of August, 1903, this answering defendant has been in the exclusive and actual occupation and possession of said placer mining claim, save and except so much of the same as was granted to the plaintiff for a right of way, as set forth in paragraph 16 of this first affirmative defense.

18.

That the said ground above described as the "Any Old Thing" placer mining claim is valuable only for the deposits of gold in the sands thereof.

19.

That it will be impossible to work the said ground without a large quantity of water; and that all the waters of said Nome river are necessary for mining the same.

And for a further, second and affirmative answer to the plaintiff's complaint, defendant alleges:

Defendant repeats and reaffirms paragraphs 1 and 2 of its first affirmative answer as paragraphs 1 and 2 of this further, second and affirmative answer to plaintiff's complaint.

3.

That Nome and Snake rivers are, and were at all times herein mentioned, natural watercourses, having their source and head tributaries in the Sawtooth Range of mountains, and sloping towards Bering Sea, being each approximately fifty miles in length, and running in [36] the same general direction, and both of said rivers emptying into said Bering Sea.

That placer gold, in paying quantities, was discovered by the miners upon Snake and Nome rivers and their tributaries, in the fall of the year, 1898, and thereafter during the year 1898, and in the subsequent years, several thousand persons in number came into the country comprising the watersheds of said rivers, and located placer mining claims and engaged in mining the same; that most of said placer

mining claims embraced within the region aforesaid, cannot be profitably mined and operated except with a large volume of water under pressure, and it at once became, and now is, the custom among the miners in said region, to divert the waters of the natural streams in said region, and to carry the same in ditches, flumes and pipe-lines, to be used in mining said placer ground; that by the customs of the miners in said region, and all other regions of the District of Alaska, it has become established that the person making the prior location, appropriation and diversion of the unappropriated waters of a stream flowing through the public domain is entitled to the prior use of the same.

4.

That Deep Canyon creek, Buffalo creek, Divide creek and Dorothy creek form the head tributaries of the headwaters of said Nome creek.

5.

That during the summer of 1900, defendant and its grantors and predecessors in interest located and appropriated all of the waters flowing in said Buffalo creek, at a point on said creek about one mile above the mouth thereof, and during said year 1900, built and constructed a dam on said creek, and diverted all of the water flowing in the channel of said creek by means of a ditch commencing at said dam; that said water was located, appropriated and diverted for the purpose of being conveyed, carried and taken, by means of a ditch and pipe-line, to the placer mining ground above described, and there to [37] be sold or "farmed" out to the miners in that locality

for mining purposes; and also, to be used by the defendant and its predecessors in interest on said Dorothy creek and other creeks, in mining and hydraulicking mining ground owned and controlled by the defendant under the level of the line of its said ditch.

6.

That the defendant and its grantors and predecessors in interest have ever since said year 1900 been engaged in constructing and building their said ditch and pipe-line from said dam or intake on said Buffalo creek, and are now engaged in extending and completing the same for the purposes hereinbefore set forth, as diligently as possible, the weather and season of the year permitting, and that the carrying capacity of said ditch, when completed, will be far in excess of all the waters flowing in said Buffalo creek at the head or intake of said ditch.

7.

That the purposes for which said water was located, appropriated and diverted by the defendants, its grantors and predecessors in interest, as aforesaid, were and are reasonable, necessary, useful and not wasteful.

8.

That the location, appropriation and diversion of all of the waters of said Buffalo creek by the defendants, its grantors and predecessors in interest, was long prior in time and right to the alleged location, appropriation and diversion of the waters of Nome river by the plaintiff.

9.

That by reason of said location, appropriation and diversion above described, the defendant is now the owner and entitled to the possession and use of all the waters flowing in said stream. [38]

And for a further, third and affirmative answer to the plaintiff's complaint, defendant alleges:

1.

Defendant repeats and reaffirms paragraphs 1 and 2 of its first affirmative answer and paragraphs 3 and 4 of its second affirmative answer as paragraphs 1, 2, 3 and 4 of this further, third and affirmative answer to plaintiff's complaint.

5.

That said defendant is now, and it and its grantors and predecessors in interest were, at all the times mentioned in plaintiff's complaint, the owners of most all of the mineral ground on the headwaters of said Nome river, including the said Buffalo creek, Dorothy creek and Divide creek, and the ground on either side of and including the bed of Nome river between said Buffalo creek and Dorothy creek, and it and its grantors and predecessors in interest have been in the continued and uninterrupted possession thereof long prior to the times hereinbefore mentioned. That the greater part of said placer mining ground above described lies below said Buffalo creek, and comprises an area of about 6,000 acres of mineral-bearing ground valuable for the native gold contained within the auriferous gravel thereof.

6.

That the defendant is the owner, by virtue of a

prior location, appropriation and diversion, made by it and its grantors of all of the waters of said Buffalo creek, to the extent of all the waters in said stream running in the channel of said stream; that said defendant and its grantors, long prior to the alleged location and appropriation of the plaintiff on said Nome river, mentioned in its complaint had located, appropriated, diverted and used all the water running and flowing in said Buffalo creek at a point about one-fourth of a mile above its mouth, for mining purposes on Dorothy creek, and the placer ground on the limits of said Nome river.

That after locating, appropriating and diverting the waters [39] of said Buffalo creek, the defendant and its grantors, as rapidly as possible, constructed from its intake on said Buffalo creek a ditch and pipe-line through its said placer mining ground to said Dorothy creek, a distance of about eight miles; that during the construction of said ditch and pipe-line, defendant conducted mining operations on its placer ground on the right limit of Nome river, near Divide creek, using the waters of said Buffalo creek for hydraulicking.

That while so engaged and employed in said work the defendant, by deed, granted the plaintiff an easement, or right of way, across its said placer ground, below the level and line of defendant's ditch, for the plaintiff to build what is known as the Nome river extension of plaintiff's Hobson ditch; that plaintiff accepted said right of way and constructed said extension thereafter with full knowledge of defendant's ownership and control and prior right to all of

said water of said Buffalo creek, and the other head tributaries of Nome river; that at the time of said grant, and long prior to the time plaintiff made any diversion, appropriation or use of any of the waters of said Nome river, and long prior to plaintiff's completion of said Nome river extension ditch, plaintiff assisted and aided the defendant in its construction of said Buffalo-Dorothy creek ditch and pipeline, commonly known as the Campion lower ditch or Debris ditch.

That by virtue of said grant and by virtue of said acts of plaintiff, the plaintiff is now estopped from asserting any claim of title to any of the waters of said Buffalo creek in the possession, use and control of the defendant.

7.

That by reason of said location, appropriation, diversion and use of the waters of said Buffalo creek, as above set forth, the defendant is the owner and entitled to the possession of all of said water.

WHEREFORE, said defendant prays that the plaintiff take nothing by its complaint, and that said defendant be decreed to be [40] the owner and entitled to the possession of all the waters of said Buffalo creek; and that defendant have and recover its costs and disbursements herein.

WILLIAM A. GILMORE,

DUDLEY DU BOSE,

Attorneys for Defendant.

United States of America,
District of Alaska,—ss.

B. Niggemeyer, being first duly sworn, on oath, de-

52 *Wild Goose Mining and Trading Company*

poses and says: That he is the secretary of the Cam-
pion Mining & Trading Company, a corporation, the
answering defendant in the above-entitled action;
that he makes this verification on behalf of said de-
fendant corporation; that he has read the foregoing
second amended answer and knows the contents
thereof, and that the same is true, as he verily be-
lieves.

B. NIGGEMEYER.

Subscribed and sworn to before me, this 3d day of
July, 1905.

[Seal]

GEO. V. BORCHSENIUS.

Clerk U. S. Dist. Court, Alaska, 2d Division.

By Angus McBride,

Deputy Clerk.

Service admitted at Nome, Alaska, this 3d day of
July, A. D. 1905, by receiving a copy of this second
amended answer, certified to as correct by William
A. Gilmore of counsel for defendant.

S. D. WOODS,
ALBERT FINK,
IRA D. ORTON,
W. H. METSON,
JOS. K. WOOD,
J. H. TAM,

Of Counsel for Plaintiff.

[Endorsed]: Filed in the Office of the Clerk of the
U. S. Dist. Court, Alaska, Second Division, at Nome,
Alaska. July 3, 1905. Geo. V. Borchsenius, Clerk.
By Angus McBride, Deputy Clerk. [41]

*In the United States District Court in and for the
District of Alaska, Second Division.*

MIOCENE DITCH COMPANY, a Corporation,
Plaintiff,

vs.

T. A. CAMPION and the CAMPION MINING &
TRADING COMPANY, a Corporation,
Defendants.

**Reply [to Second Amended Answer of Campion
Mining & Trading Company].**

Comes now the plaintiff in the above-entitled action, and for reply to the second amended answer of the defendant Campion Mining & Trading Company, a corporation, alleges and denies as follows, to wit:

1.

For reply to the affirmative answer to plaintiff's complaint first set forth in said second amended answer, the plaintiff denies that the defendant, Campion Mining & Trading Company, has ever been engaged in the business of supplying water for the general use of the public in the District of Alaska.

2.

Further replying to said affirmative answer to plaintiff's complaint first set forth in said second amended answer, plaintiff denies each and every allegation of paragraphs 3 to 19, inclusive, of said affirmative answer to plaintiff's complaint first set forth in said second amended answer of the defendant Campion Mining & Trading Company.

3.

Replying to the further, second and affirmative

answer to plaintiff's complaint, set forth in the second amended answer of the defendant *Campion Mining & Trading Company*, plaintiff denies each and every allegation of paragraphs 5, 6, 7, 8 and 9 of said further, second and affirmative answer to plaintiff's complaint.

4.

And for reply to the further, third and affirmative answer to [42] plaintiff's complaint contained in the second amended answer of the defendant *Campion Mining & Trading Company*, the plaintiff denies each and every allegation of paragraphs 5, 6 and 7 of said further, third and affirmative answer to plaintiff's complaint.

And as a further, separate and affirmative reply to said second amended answer and to the "affirmative answer" to plaintiff's complaint, set forth in the second amended answer of the defendant, *Campion Mining & Trading Company*, and, also, as a further, separate and affirmative reply to the further, second and affirmative answer to plaintiff's complaint, alleged and set forth in the second amended answer of the defendant, *Campion Mining & Trading Company*, and, also, as a further, separate and affirmative reply to the further, third and affirmative answer to plaintiff's complaint, alleged and set forth in the second amended answer of the defendant, *Campion Mining & Trading Company*, plaintiff alleges:

1.

That ever since the discovery of gold in the Cape Nome Mining District, District of Alaska, in the year 1898, there has been and now is a local law, regu-

lation and rule and custom, with reference to the location and appropriation of water for mining or other purposes in said district, under and by virtue of which said local law, regulation, rule and custom it was and is necessary, as part of the act of location and appropriation, for the locator or appropriator of said water and water right to file, within a reasonable time, in the recorder's office for the mining district wherein which said water and water right is situated a record notice of his location and appropriation of said water or water right, and this said local rule, law, regulation and custom has always been and is now generally recognized and acknowledged, and has been and has always been and now is universally followed and adhered to by all persons in said mining district.

2.

That by the provisions of the aforesaid local law, rule, regulation [43] and custom a person failing to comply with the aforesaid local law, rule, regulation and custom in relation to recording, as hereinbefore set out, loses and forfeits all and singular any right or rights to any water or water rights which may have been by him attempted to be located or appropriated.

3.

That the defendant and its predecessor in interest utterly failed and neglected to file for record, within a reasonable time, any notice of location whatever, or to make or cause to be made within a reasonable time, any record notice whatsoever of their alleged and pretended location and appropriation of the

waters of Buffalo creek, in their second amended answer specified, and said defendant and its predecessors in interest wholly failed and neglected to file for record, or to make or cause to be made any record notice whatsoever of their said alleged and pretended location and appropriation of said waters of Buffalo creek, until a time long subsequent to the location and appropriation of said waters by the plaintiff as in its complaint alleged.

4.

That long prior to the said defendant, *Campion Mining & Trading Company*, its grantors or predecessors in interest, filing in the office of the recorder for the Cape Nome Mining District, or the Cape Nome Recording District, District of Alaska, of any notice or certificate of location of any water right on Buffalo creek, and long prior to said *Campion Mining & Trading Company*, or its grantors or predecessors in interest, making or causing to be made any record in said office or offices, claiming any of the waters of said Buffalo creek, the plaintiff and its grantors and predecessors in interest had located and appropriated the waters of Nome river, to the extent set forth in their complaint herein, and were proceeding with reasonable diligence to build and construct a ditch, flume and pipe-line to divert and use the same for mining and other beneficial purposes; which said ditch, flume and pipe-line, was thereafter, with reasonable [44] diligence completed, as in its said complaint alleged. And said plaintiff and its grantors and predecessors in interest did, within a reasonable time, after their loca-

tion, of said waters of Nome river, file and record in the office of the Cape Nome Recording District, District of Alaska, within which said water is wholly situate, a record notice of the location of said water right and the location thereof as required by said local law, rule, regulation and custom.

And for a second, further, separate and affirmative reply unto the second amended answer of the defendant Campion Mining & Trading Company, plaintiff alleges as follows, to wit:

1.

That said defendant, the said Campion Mining & Trading Company, ought not in equity and good conscience to be allowed to deny the right of the plaintiff herein as alleged and set forth in its complaint, for the following reasons, to wit:

1. Because the grantors and predecessors in interest of the defendant did not object to the location of the water right of plaintiff made by its agent R. M. B. Tidd, on Nome river on the 7th day of June, 1902, upon certain lands claimed by the said grantors and predecessors of said defendant with knowledge acquired shortly subsequent thereto by them that the said location of said water right had been so made and that the notice thereof had been posted upon the said Nome river within the boundaries of the said land so claimed by the said defendant, its grantors and predecessors, and that the same had been recorded in the office of the Recorder of the Cape Nome Recording District, District of Alaska.

2. Because subsequent to said location as aforesaid, said defendant granted to said plaintiff a right

of way over the said lands so claimed as aforesaid for the ditch of the said plaintiff.

3. Because the grantors and predecessors of said defendant made statements to said plaintiff subsequent to the said location, that they did not claim any water right on said Nome river, adverse or in opposition or prior to said plaintiff. [45]

4. Because said defendant aided and assisted said plaintiff in constructing its ditch for the diversion of the waters of said Nome river so located as aforesaid.

5. Because said defendant at all times by its conduct led the plaintiff to believe that said plaintiff had as against the said defendant a prior right to the said waters of Nome river to the amount of three thousand inches the same being the amount claimed by said plaintiff in and by its notices of location thereof hereinbefore mentioned and set forth.

6. Because said defendant stood by and allowed and permitted the said plaintiff without objection and without assertion of any adverse prior right to said waters of Nome river, to the amount of said three thousand miner's inches, to expend large sums of money in the construction and completion of its entire works for the diversion of the said waters which said works have *been* at all times since the construction and completion thereof been used by the said plaintiff for the diversion of said waters and the conveyance thereof to the place where the *same* has been at all times by the said plaintiff put to a beneficial use, to wit, in carrying on its own mining operations and in the sale thereof to others for a like

purpose on their part.

7. Because the conduct and acts of said defendant at all times prior to its interference with the said plaintiff in the year 1904, should bar the said defendant from ever asserting any prior right to the said waters of Nome river to the amount of said three thousand miner's inches by virtue of any prior appropriation or diversion thereof or by virtue of any claim or right whatsoever, or by virtue of any appropriation or diversion of the waters of Buffalo creek, a tributary of Nome river.

And for a further and separate reply to the affirmative answer to plaintiff's complaint, first alleged and set forth in the second amended answer of the Campion Mining and Trading Company, plaintiff alleges:

1.

That the lands and premises mentioned in said affirmative [46] answer to plaintiff's complaint and alleged therein to have been located and appropriated as placer mining claims by the grantors and predecessors in interest of the defendant company, and alleged in said second amended answer to be situate on Nome river and Buffalo creek, and designated therein as the "Any Old Thing" and the "Hobo" Placer mining claims, containing one hundred and sixty acres each, or thereabouts and alleged to have been each located by eight persons, were never in fact located by eight persons, but by one P. F. Cummings, for the use and benefit of himself and T. A. Campion, and that said P. F. Cummings attempted to locate said placer mining claims known as and called

the "Any Old Thing" and the "Hobo," in the names of eight persons, without any authority whatever from said eight persons, and solely for his own use and benefit, and for the use and benefit of said T. A. Campion.

2.

That any conveyance or deed from said purported locators of said placer mining claims was made and executed without any consideration whatever, and in pursuance of an agreement and understanding between the alleged locators and the said P. F. Cummings, that they would convey said placer mining claims to any person whom said Cummings might designate, without any consideration whatever.

3.

That said alleged placer mining claims known as and called the "Any Old Thing" and the "Hobo" were not in fact located by eight persons, but were located by said Cummings in the names of eight persons, who had theretofore agreed, or whom said Cummings believed would transfer said claim to whomever he, the said Cummings, might name or designate, without consideration, for the sole purpose of attempting to procure and obtain one hundred and sixty acres tracts of placer mineral ground of the United States in one location, for his, Cummings, and the said T. A. Campion's use and benefit.

Wherefore, plaintiff having fully replied to the second amended answer of the defendant herein filed,

prays that it be dismissed [47] hence with its costs.

W. H. METSON,
ALBERT FINK,
J. K. WOOD,
IRA D. ORTON,
S. D. WOODS,
Attorneys for Plaintiff.

J. H. TAM,
Of Counsel.

United States of America,
District of Alaska,—ss.

W. L. Leland, being first duly sworn, on his oath deposes and says:

That he is the Secretary of the Miocene Ditch Company, a corporation, the plaintiff in the above-entitled action, and also the agent designated by said company upon whom service of process may be made in the District of Alaska; that he has read over the above and foregoing reply, knows the contents thereof and verily believes the same to be true.

W. L. LELAND.

Subscribed and sworn to before me, this 6th day of July, 1905.

[Seal] THOS. R. WHITE,
Notary Public, District of Alaska, at Nome, Alaska.

[Endorsed]: Filed in the Office of the Clerk of the U. S. Dist. Court, Alaska, Second Division, at Nome, Alaska. July 6, 1905. Geo. V. Borchsenius, Clerk. By Angus McBride, Deputy Clerk. [48]

*In the United States District Court in and for the
District of Alaska, Second Division.*

MIOCENE DITCH COMPANY, a Corporation,
Plaintiff,

vs.

T. A. CAMPION and the CAMPION MINING &
TRADING COMPANY, a Corporation,
Defendants.

Supplemental Complaint.

Comes now the plaintiff in the above-entitled action, and by leave of the Court first had and obtained, files this, its supplemental complaint, and alleges and shows to the Court as follows:

1.

That since the commencement of this action, and on the 8th day of August, 1904, continuously up to and including the 29th day of September, 1904, and until 11 o'clock A. M. of the 30th day of September, 1904, the defendant Campion Mining & Trading Company, diverted the waters of Buffalo creek at a point above the dam and intake of plaintiff's Nome river ditch, and carried the said waters of said Buffalo creek around and away from the said plaintiff's Nome river ditch, and deprived the plaintiff of the use of the same as follows:

On the 9th day of August, 1904, 500 miner's inches of
water;

On the 10th day of August, 1904, 500 miner's inches
of water;

On the 11th day of August, 1904, 550 miner's inches
of water;

On the 12th day of August, 1904, 750 miner's inches of water;

On the 13th day of August, 1904, 650 miner's inches of water;

On the 14th day of August, 1904, 500 miner's inches of water;

On the 15th day of August, 1904, 500 miner's inches of water;

On the 16th day of August, 1904, 600 miner's inches of water;

On the 17th day of August, 1904, 585 miner's inches of water;

On the 18th day of August, 1904, 368 miner's inches of water;

On the 19th day of August, 1904, 792 miner's inches of water;

On the 20th day of August, 1904, 900 miner's inches of water; [49]

On the 21st day of August, 1904, 140 miner's inches of water;

On the 22d day of August, 1904, 22 miner's inches of water;

On the 23d day of August, 1904, 22 miner's inches of water;

On the 24th day of August, 1904, 792 miner's inches of water;

On the 25th day of August, 1904, 140 miner's inches of water;

On the 26th day of August, 1904, 93 miner's inches of water;

On the 27th day of August, 1904, 323 miner's inches of water;

64 *Wild Goose Mining and Trading Company*

On the 28th day of August, 1904, 585 miner's inches of water;

On the 29th day of August, 1904, 792 miner's inches of water;

On the 30th day of August, 1904, 585 miner's inches of water;

On the 31st day of August, 1904, 140 miner's inches of water;

On the 1st day of September, 1904, 140 miner's inches of water;

On the 2d day of September, 1904, 198 miner's inches of water;

On the 3rd day of September, 1904, 690 miner's inches of water;

On the 4th day of September, 1904, 792 miner's inches of water;

On the 5th day of September, 1904, 940 miner's inches of water;

On the 6th day of September, 1904, 850 miner's inches of water;

On the 7th day of September, 1904, 900 miner's inches of water;

On the 8th day of September, 1904, 900 miner's inches of water;

On the 9th day of September, 1904, 792 miner's inches of water;

On the 10th day of September, 1904, 930 miner's inches of water;

On the 11th day of September, 1904, 998 miner's inches of water;

On the 12th day of September, 1904, 950 miner's inches of water;

- On the 13th day of September, 1904, 800 miner's inches of water;
- On the 14th day of September, 1904, 792 miner's inches of water;
- On the 15th day of September, 1904, 368 miner's inches of water;
- On the 16th day of September, 1904, 478 miner's inches of water;
- On the 17th day of September, 1904, 711 miner's inches of water;
- On the 18th day of September, 1904, 911 miner's inches of water;
- On the 19th day of September, 1904, 850 miner's inches of water;
- On the 20th day of September, 1904, 800 miner's inches of water;
- On the 21st day of September, 1904, 800 miner's inches of water;
- On the 22nd day of September, 1904, 800 miner's inches of water; [50]
- On the 23d day of September, 1904, 800 miner's inches of water;
- On the 24th day of September, 1904, 800 miner's inches of water;
- On the 25th day of September, 1904, 800 miner's inches of water;
- On the 26th day of September, 1904, 700 miner's inches of water;
- On the 27th day of September, 1904, 650 miner's inches of water;
- On the 28th day of September, 1904, 700 miner's inches of water;

On the 29th day of September, 1904, 750 miner's inches of water;

2.

That the amount of water aforesaid, for the days aforesaid, was taken by the said Campion Mining & Trading Company, out of said Buffalo Creek and carried around and below plaintiff's intake.

3.

That if said waters of said Buffalo creek had not been so diverted and carried around and below plaintiff's intake of its said Nome river ditch, by the defendant Campion Mining & Trading Company, the same would have flown down and through the plaintiff's said Nome river ditch, and would have been, by the plaintiff, put to a beneficial use; that the said plaintiff's Nome river ditch was not otherwise filled with water, and during all the dates aforesaid plaintiff's Nome river ditch would have carried the amount of water specified for each of said dates, in addition to the water obtained by plaintiff from other sources and carried in its said Nome river ditch.

4.

That during all of said times the plaintiff was the owner, by virtue of the prior location, appropriation, diversion and use, of the said water so diverted by the defendant, Campion Mining & Trading Company, and by it carried around and below plaintiff's said intake.

5.

That the value of said water was at said time One Dollar and Fifty Cents (\$1.50) per inch, per day.

6.

That by reason of said wrongful diversion of said water by [51] said Champion Mining & Trading Company, as herein alleged, plaintiff has been damaged in the sum of \$48,478.50.

WHEREFORE, plaintiff prays judgment against said defendants for the sum of \$48,478.50, and their costs and disbursements, in addition to the prayer in the original complaint.

W. H. METSON,
ALBERT FINK,
S. D. WOODS,
J. K. WOOD,
IRA D. ORTON,
Attorneys for Plaintiffs.

United States of America,
District of Alaska,—ss.

W. H. Metson, being first duly sworn, on his oath, deposes and says:

That he is the President of the plaintiff corporation, Miocene Ditch Company; that he has read the above and foregoing complaint, knows the contents thereof, and believes the same to be true.

W. H. METSON.

Subscribed and sworn to before me this 11th day of July, 1905.

[Seal]

ALBERT FINK,
Notary Public, District of Alaska, Residing at
Nome.

Service of a copy of the foregoing this 12th day of July, 1905, admitted.

D. DU BOSE,
Attorney for Defendant.

[Endorsed]: Filed in the Office of the Clerk of the U. S. Dist. Court, Alaska, Second Division, at Nome, Alaska, July 12, 1905. Geo. V. Borchsenius, Clerk. By Angus McBride, Deputy Clerk. [52]

*In the United States District Court for the District
of Alaska, Second Division.*

MIOCENE DITCH COMPANY, a Corporation,
Plaintiff,

vs.

T. A. CAMPION and the CAMPION MINING
& TRADING COMPANY, a Corporation,
Defendants.

Answer to Supplemental Complaint.

Comes now the Campion Mining & Trading Company, the answering defendant in the above-entitled cause, and for answer to the supplemental complaint of plaintiffs filed herein denies each and every material allegation, matter and thing set forth and alleged in paragraphs numbered one (1), two (2), three (3), four (4), five (5), and six (6) of said supplemental complaint, save and except that this answering defendant diverted the waters of Buffalo Creek.

DUDLEY DU BOSE,
WILLIAM A. GILMORE,
Attorneys for Defendant Campion Mining & Trading Company.

United States of America,
District of Alaska,—ss.

B. Niggemeyer, being first duly sworn, on my oath depose and say: That I am the secretary of the answering defendant in the above-entitled cause, the Campion Mining & Trading Company; that I have read the foregoing answer to supplemental complaint, and know the contents thereof, and that the same is true as I verily believe.

B. NIGGEMEYER.

Subscribed and sworn to before me, this 14th day of July, 1905.

[Seal]

THOS. R. WHITE,

Notary Public for the District of Alaska.

Due and legal service of the foregoing answer to supplemental complaint in the above-entitled cause and court is hereby admitted at Nome, Alaska, this 14th day of July, A. D. 1905.

ALBERT FINK,

Of Counsel for Plaintiff.

[Endorsed]: Filed in the Office of the Clerk of the U. S. Dist. Court, Alaska, Second Division, at Nome, Alaska, July 14, 1905. Geo. V. Borchsenius, Clerk.
By Angus McBride, Deputy Clerk. [53]

*In the United States District Court for the District
of Alaska, Second Division.*

MIOCENE DITCH COMPANY, a Corporation,
Plaintiff,

vs.

T. A. CAMPION and the CAMPION MINING
& TRADING COMPANY, Corporation,
Defendants.

Stipulation [for Amendment of Complaint].

IT IS HEREBY STIPULATED AND AGREED that the complaint of the plaintiff on file in the above-entitled action may be amended, and the same is hereby amended, by adding thereto after paragraph "X" thereof, the following allegations, the same being as and for second and third separate and distinct causes of action, to wit:

XI.

That plaintiff herein complains of the defendant the Campion Mining and Trading Company and for cause of action alleges:

1.

That it is now, and has been for a long time prior hereto, the owner of and in the possession of, and entitled to the possession of certain water locations and water rights, situated on the Grand Central River, in the Kougarok Mining District, District of Alaska, to the amount of 5,000 miner's inches thereof, and is the owner of the waters of said Grand Central river to the extent of said 5,000 inches.

2.

That said plaintiff is also the owner and in the possession and entitled to the possession of certain rights of way connected with said 5,000 miner's inches of water aforesaid, for the delivery of said waters in Nome river, above the present intake of said plaintiff's ditch on said Nome river.

3.

That the said defendant denies the right and title of the plaintiff, of, in and to, the said water, water locations, water [54] rights and rights of way, and claims the same adversely to said plaintiff, but that the said claim of the said defendant is without right.

XII.

That for a third, separate and distinct cause of action, plaintiff alleges:

I.

That it is now, and has been for a long time prior hereto, the owner of, and in the possession and entitled to the possession of certain water locations and water rights, situated on David creek, in the Cape Nome Mining and Recording District, District of Alaska, to the amount of 1,000 miner's inches thereof, and is the owner of the waters of said David creek to the extent of said 1,000 miner's inches.

II.

That said plaintiff is also the owner and in the possession and entitled to the possession of certain rights of way connected with said 1,000 miner's inches of water aforesaid, for the delivery of said waters in Nome river, above the present intake of said plaintiff's ditch on said Nome river.

III.

That the said defendant denies the right and title of the plaintiff, of, in and to the said water, water locations, water rights and rights of way, and claims the same adversely to said plaintiff, but that the said claim of the said defendant is without right.

And that the prayer of said complaint may be amended by adding thereto, the following:

That the right, title and interest of the said plaintiff, of, in and to the waters of the Grand Central river, in the Kougarak Mining District, and David creek, in the Cape Nome Mining and Recording District, District of Alaska, and of the rights of way connected therewith, and the possession thereof, be quieted as against the claims of the said defendant, and that the said defendant be enjoined and debarred from ever asserting any right, title or interest therein, or [55] to any part thereof, or to the possession thereof adversely to the plaintiff; and for such other and further relief as to the court may seem just and equitable in the premises.

Dated at Nome, Alaska, this 24th day of July, 1905.

W. H. METSON,

ALBERT FINK,

S. D. WOODS,

J. K. WOOD,

J. H. TAM,

Of Counsel,

Attorneys for Plaintiff.

W. A. GILMORE,

DUDLEY DU BOSE,

Attorneys for Defendant Campion Mining & Trading Co.

The verification of the above and foregoing stipulation is hereby expressly waived.

Dated, Nome, Alaska, July 24th, 1905.

W. A. GILMORE,
DUDLEY DU BOSE,

Attorneys for Defendant Campion Mining and Trading Co.

IT IS HEREBY ORDERED that the plaintiff's complaint be amended as above stipulated.

Dated July 25, 1905.

ALFRED S. MOORE,
Judge District Ct., Dis. of Alaska, Second Division.

[Endorsed]: Filed in the Office of the Clerk of the U. S. Dist. Court, Alaska, Second Division, at Nome, Alaska. July 25, 1905. Geo. V. Borchsenius, Clerk. By Angus McBride, Deputy Clerk. [56]

*In the United States District Court for the District
of Alaska, Second Division.*

MIOCENE DITCH COMPANY, a Corporation,
Plaintiff,

vs.

T. A. CAMPION and the CAMPION MINING
AND TRADING COMPANY, a Corporation,
Defendants.

Answer [to Amendment of Complaint.]

Comes now the defendant the Campion Mining and Trading Company, in the above-entitled action, and for answer to the amendment of the complaint of the

plaintiff on file herein, alleges and denies as follows, to wit:

1. Denies that the plaintiff is the owner or in possession, or entitled to the possession of any of the waters of said Grand Central River, or of said David creek, or of any rights of way connected therewith. On the contrary, defendant alleges that it is the owner of, in the possession of, and entitled to the possession of the said waters and water rights, locations and rights of way connected therewith, and that the claim of the said defendant is not without right, but that the same is founded upon a prior location and appropriation of the said waters, and the whole thereof, duly and regularly made according to law, and the customs of miners in the Kougarak Mining District, District of Alaska.

For a further separate and affirmative answer to said amendment to the complaint of plaintiff filed herein, said defendant alleges:

That on or about the — day of ———, 1903, a contract was made and entered into by and between the Campion Mining and Trading Company, T. A. Campion, and the Miocene Ditch Company, being the parties plaintiff and defendant herein, which said contract is in the words and figures as follows, to wit:

WHEREAS, the Campion Mining & Trading Company and T. A. Campion claim certain water rights on what is known as David creek [57] and the Grand Central River, and

WHEREAS, the Miocene Ditch Company also claim certain water rights on Grand Central River, and McLennan Creek and David Creek, and

WHEREAS, the said Champion Mining & Trading Company and the said T. A. Champion have given rights of way to said Miocene Ditch Company, and do hereby give, grant and convey rights of way to said Miocene Ditch Company, for the purpose of building a ditch or ditches from Nome River to Grand Central River and from Nome River to David Creek and beyond, and for flumes, pipes, waste gates, incidental to said ditch rights, and with the right to enter upon and excavate said ditch and ditches and to place said pipes, flumes and other incidents in position and keep the same in repair, said rights of way and rights to excavate covering as large a capacity as the said Miocene Ditch Company may determine, to carry through said ditches and pipe incident;

NOW, THEREFORE, it is agreed that if the said Miocene Ditch Company does build and complete said extension that when it does so build and complete the same, that it, the said Miocene Ditch Company, shall build, excavate and construct a ditch, pipe, flume and incidents of such a large capacity as will carry, free of charge, for said Champion Mining & Trading Company, and said T. A. Champion, jointly, from twelve hundred to two thousand inches of water, measured under four-inch pressure of the water and water rights owned, controlled and furnished by said Champion Mining & Trading Company and T. A. Champion and along the line of said ditch, flume and pipe as laid, excavated and constructed by it, said Miocene Ditch Company, between said Nome River and said David Creek and said Nome River and Grand Central River, all in the Nome Recording District, Dis-

76 *Wild Goose Mining and Trading Company*

trict of Alaska, all the said water to be used by said
Campion and said Campion Mining & Trading Com-
pany exclusively by them, or either of them upon the
mining locations and mining property now owned
and held by them, or either of them along said Nome
River and the creeks tributary thereof above Hobson
Creek, the said water to go to said Campion and said
Campion Mining & Trading Company is not to be let,
farmed out, sold or encumbered in any way for [58]
any other purpose than for use upon their own min-
ing properties and locations or either of them, and
the water carried and conveyed in said ditch to be
delivered to said Campion Mining & Trading Com-
pany and said T. A. Campion, in no event, at no time,
to exceed one-half of the water put therein or caused
to be put therein by said mining and trading com-
pany or said Campion; the other one-half is to be the
sole and exclusive property of said Miocene Ditch
Company.

IN WITNESS WHEREOF, the parties hereto
have hereunto set their hands and caused their cor-
porated names and individual names to be hereunto
subscribed, this 19th day of August, 1903.

Signed, sealed and delivered in the presence of:

WHEREFORE, the said defendant, Campion Mining and Trading Company, prays that the said cause of action set forth in said amendment to said plaintiff's complaint on file herein, be dismissed and for its costs of suit.

W. A. GILMORE,
DUDLEY DU BOSE,

Attorneys for Said Defendant Campion Mining and Trading Company.

The verification of the foregoing answer is hereby especially waived.

Dated, Nome, Alaska, July 24th, 1905.

W. H. METSON,
IRA D. ORTON,
S. D. WOODS,
J. K. WOOD,
ALBERT FINK,

Attorneys for the Plaintiff.

[Endorsed]: Filed in the Office of the Clerk of the U. S. Dist. Court, Alaska, Second Division, at Nome, Alaska. July 24, 1905. Geo. V. Borchsenius, Clerk. By Angus McBride, Deputy Clerk. [59]

*In the United States District Court in and for the
District of Alaska, Second Division.*

MIOCENE DITCH COMPANY, a Corporation,
Plaintiff,

vs.

T. A. CAMPION and the CAMPION MINING
& TRADING COMPANY, a Corporation,
Defendants.

Reply.

Comes now the plaintiff in the above-entitled action, and for reply unto the answer of the said defendant *Campion Mining & Trading Company*, a corporation, denies and alleges as follows, to wit:

1.

Denies all and singular each and every allegation contained in paragraph 1 of said answer, wherein it is alleged that the said defendant is the owner of, in the possession of and entitled to the possession of the said water, water rights, locations and rights of way connected therewith; that the claim of said defendant is not without right, but that the same is founded upon a prior location and appropriation of said waters and the whole thereof, duly and regularly made according to law and the customs of the miners in the Kougarak Mining & Recording District, District of Alaska.

2.

Admits that the said contract set forth in said answer was made and entered into as alleged in said answer, but that the same was made and entered into upon the representations made to said plaintiff by the said *Campion Mining & Trading Company*, and the said T. A. *Campion*, that they owned certain water rights on what is known as David creek and the Grand Central river, and that said contract was entered into upon the belief upon the part of said plaintiff that the said water rights so represented belonged to and were owned by the [60] *Campion Mining & Trading Company* and the said T. A.

Campion, but that since the said execution of said contract the said plaintiff has ascertained that said defendants above mentioned did not at said time, own any of said waters, water rights or locations, and do not now own the said waters, water rights or locations, and that by reason of that fact it will be impossible, on the part of said plaintiff, to carry out and keep the terms and conditions of said contract.

Plaintiff further alleges that it intends to and has made arrangements to build and construct ditches, canals, flumes and pipe-lines from the said Grand Central river and from said David creek to conduct and carry the waters thereon located, owned and appropriated by it to Nome river, and above its intake thereon, and that it will be inequitable to allow said defendants to have or participate in any right in said waters as in said contract agreed, or to be allowed to take any of said waters carried through said ditches, aqueducts or pipe-lines, as provided in said contract, unless said defendants be compelled by a decree of this Honorable Court to pay the equal one-half of all costs and expenses of the building, construction and maintenance of said ditches, canals, aqueducts and pipe-lines;

And that it be further decreed that said defendants be enjoined from using said ditches, canals, aqueducts and pipe-lines, or the water carried from the said Grand Central river and David creek, in any way whatsoever, unless they shall first advance the equal one-half, as soon as estimated of all costs of construction and maintenance thereof.

WHEREFORE, said plaintiff prays, in addition to

the prayer of its amended complaint, that in the decree to be entered in the above-entitled action it be provided:

That the said defendants be enjoined from using the said ditches, flumes, aqueducts and pipe-lines above mentioned and set forth, except upon the conditions mentioned and set forth; and for such other and further judgment, order and decree as to the court may seem just and equitable, besides its costs of suit.

W. H. METSON,

ALBERT FINK,

IRA D. ORTON,

S. D. WOODS,

J. K. WOOD,

Attorneys for Plaintiff.

J. H. TAM,

Of Counsel. [61]

The verification of the above and foregoing Reply is hereby especially waived and service admitted.

Dated July 24th, 1905, Nome, Alaska.

W. A. GILMORE,

DUDLEY DU BOSE,

Attorneys for said Defendants.

[Endorsed]: Filed in the Office of the Clerk of the U. S. Dist. Court, Alaska, Second Division, at Nome, Alaska. July 25, 1905. Geo. V. Borchsenius, Clerk. By Angus McBride, Deputy Clerk. [62]

In the District Court for the District of Alaska, Second Division.

No. —.

MIOCENE DITCH COMPANY, a Corporation,
Plaintiff,

vs.

T. A. CAMPION and the CAMPION MINING
& TRADING COMPANY, a Corporation,
Defendants.

Second Supplemental Complaint.

Comes now the plaintiff in the above-entitled action and by leave of Court first had and obtained, files this its second supplemental complaint, and alleges and shows as follows:

I.

That on the 8th day of August, 1904, the plaintiff commenced its action in this court against the defendants above named, by the service of a summons and copy of complaint upon said defendants; that the defendants duly appeared in said action; that said action was thereafter dismissed as against the defendant T. A. Campion; that the plaintiff thereafter filed amendments to its said original complaint, and also a supplemental complaint herein; that the defendant, the Campion Mining & Trading Company filed its answer and amended answer to said original complaint and its answer to said supplemental complaint.

II.

That since the filing of said answers by the

Campion Mining & Trading Company, said defendant has abandoned and forfeited the several mining claims and locations in said answers mentioned; and the plaintiff further alleges that if said defendant, or its predecessor in interest at any time located or appropriated any or all of the several waters, water rights, ditches and right of way for the same, in said answers mentioned, that the same and each of them have, since the commencement of said action, been forfeited and abandoned by said defendant, and the waters appropriated by the defendant, if any, [63] have not, for more than three years last past, been put to any beneficial use by said defendant, whether as in said answer alleged or otherwise.

III.

That the plaintiff hereby refers to and makes a part hereof as if the same were herein repeated and as a part of this supplemental complaint, the several complaints heretofore filed by it in this action, except so far as the facts therein alleged are modified by this supplemental complaint.

IV.

That the plaintiff, since the commencement of this action, has continued, during all mining seasons, to maintain, improve and enlarge its ditches mentioned in the original complaint, and increase the capacity thereof, and the flow of water therein, and used the said waters for the purposes and in the manner mentioned in its original complaint herein.

WHEREFORE, the plaintiff demands judgment

as in the original and first supplemental complaints amended.

G. J. LOMEN,
Attorney for Plaintiff.

District of Alaska,
Nome Precinct,—ss.

————— being first duly sworn, on oath says:

That he is the ————— for the plaintiff above named; that he has read the foregoing second supplemental complaint herein, and knows the contents thereof and that the same are true as he verily believes.

Sworn to before me this ——— day of April, 1912.

Notary Public in and for the District of Alaska.

[Endorsed]: Filed in the Office of the Clerk of the U. S. Dist. Court, Alaska, Second Division, at Nome, Alaska. April 15, 1912. John Sundback, Clerk. By J. Allison Bruner, Deputy. [64]

*In the District Court for the District of Alaska,
Second Division.*

MIOCENE DITCH COMPANY, a Corporation,
Plaintiff,

vs.

T. A. CAMPION and the CAMPION MINING
& TRADING COMPANY, a Corporation,
Defendants.

Answer to Second Supplemental Complaint.

The defendant, *Campion Mining & Trading Company*, a corporation, for answer to plaintiff's Second Supplemental Complaint—

1. Denies each and every allegation in paragraph II and the whole thereof.

2. Alleges that it has not sufficient knowledge or information to form a belief as to the truth of the allegations contained in paragraph IV, and it therefore denies the same, and each and every allegation in said paragraph contained.

WHEREFORE, answering defendant prays that this action may be dismissed at the costs of plaintiff.

GEO. D. SCHOFIELD,

Atty. for Dft. *Campion Mining & Trading Company*.

Service accepted and verification waived.

G. J. LOMEN,

Atty. for Plaintiff.

[Endorsed]: Filed in the Office of the Clerk of the U. S. Dist. Court of Alaska, Second Division, at Nome. Apr. 16, 1912. John Sundback, Clerk. By J. Allison Bruner, Deputy. [65]

[Stipulation Re Testimony, etc.]

In the United States District Court for the District of Alaska, Second Division.

MIOCENE DITCH COMPANY, a Corporation,
Plaintiff,

vs.

T. A. CAMPION and the CAMPION MINING
& TRADING COMPANY, a Corporation,
Defendants.

IT IS HEREBY STIPULATED by and between the parties to the above-entitled action that the testimony of witnesses heretofore taken in the above-entitled court at the former trial of said action may be by either party read, subject to all the legal objections and exceptions at the new trial of said action in said United States District Court for the District of Alaska, Second Division, or any continuance thereof whether the said witnesses or any of them be within the District at the time of the said new trial or any continuance thereof or absent therefrom; and that all the parties hereto may introduce at such new trial or any continuance thereof, further or other evidence, or the same or other witnesses, subject to all legal objections and exceptions as they may be advised; it being further understood that neither the plaintiff nor defendants shall be compelled to produce the witnesses who had testified on the previous trial.

IRA D. ORTON,
ALBERT FINK,

By W. H. METSON,
W. H. METSON,

Attorneys for Plaintiff.

GEORGE D. SCHOFIELD,
By WEST & DE JOURNAL,
Attorneys for Defendant.

[Endorsed]: Filed in the Office of the Clerk of the District Court of Alaska, Second Division, at Nome. April 15, 1912. John Sundback, Clerk. By J. Allison Bruner, Deputy. [66]

[Minutes—October 30, 1911.]

In the District Court for the District of Alaska, Second Division.

Term Minutes, General, 1911, Term, beginning February 1, 1911.

Monday, October 30, 1911, at 10 A. M.

Court convened pursuant to adjournment.

Hon. CORNELIUS D. MURANE, District Judge, presiding.

Upon the convening of Court the following proceedings were had:

1176.

MIOCENE DITCH CO.

vs.

CAMPION M. & T. CO.

[Recital Re Withdrawal of Ira D. Orton, as Attorney.]

Upon application of Mr. Ira D. Orton it was ordered that the record show that he was no longer an attorney in the case. [67]

[Minutes—February 5, 1912.]

In the District Court for the District of Alaska, Second Division.

Term Minutes, General, 1912, Term, beginning
February 5, 1912.

Monday, February 5, 1912, at 11 A. M.

Court convened at the hour of 11 A. M. pursuant
to an order heretofore made and entered calling the
General 1912 Term of Court.

Hon. CORNELIUS D. MURANE, District Judge,
presiding.

Upon the convening of Court the following proceedings were had:

1176.

MIOCENE DITCH CO.

vs.

T. A. CAMPION et al.

**[Recital Re Withdrawal of William A. Gilmore, as
Counsel for Defendants.]**

Upon motion of Mr. William A. Gilmore he was
permitted to withdraw his name as attorney for
defendants.

1176.

MIOCENE DITCH CO.

vs.

T. A. CAMPION and CAMPION M. & T. CO.

The disposition of the foregoing cases was passed
until Saturday next. [68]

[Minutes—February 10, 1912.]

In the District Court for the District of Alaska, Second Division.

Term Minutes, General, 1912, Term, beginning February 5, 1912.

Saturday, February 10, 1912, at 10 A. M.

Court convened pursuant to adjournment.

Hon. CORNELIUS D. MURANE, District Judge, presiding.

Upon the convening of Court the following proceedings were had:

1176.

MIOCENE DITCH CO.

vs.

T. A. CAMPION and CAMPION M. & T. CO.

The foregoing cases were stricken from the equity trial calendar. [69]

[Minutes—April 1, 1912.]

In the District Court for the District of Alaska, Second Division.

Term Minutes, General, 1912, Term, beginning February 5, 1912.

Monday, April 1, 1912, at 10 A. M.

Court convened pursuant to adjournment.

Hon. CORNELIUS D. MURANE, District Judge, presiding.

Upon the convening of Court, the following proceedings were had:

1176.

MIOCENE DITCH CO.

vs.

T. A. CAMPION et al.

This being the time fixed by the Court for the trial of this cause, upon agreement of the parties the trial thereof was continued until 10 A. M., Friday, April 5th, 1912. [70]

[Minutes—April 5, 1912.]

In the District Court for the District of Alaska, Second Division.

Term Minutes, General, 1912, Term, beginning February 5, 1912.

Friday, April 5, 1912, at 10 A. M.

Court convened pursuant to adjournment.

Hon. CORNELIUS D. MURANE, District Judge, presiding.

In the absence of Judge Cornelius D. Murane, J. Allison Bruner, Deputy Clerk of the Court, adjourned Court until 10 A. M. Saturday, April 6, 1912. [71]

[Minutes—April 6, 1912.]

In the District Court for the District of Alaska, Second Division.

Term Minutes, General, 1912, Term, beginning February 5, 1912.

Saturday, April 6, 1912, at 10 A. M.

Court convened pursuant to adjournment.

Hon. CORNELIUS D. MURANE, District Judge, presiding.

In the absence of Judge Cornelius D. Murane, J. Allison Bruner, Deputy Clerk of the Court, adjourned Court until 10 A. M. Saturday, April 13, 1912. [72]

[Minutes—April 13, 1912.]

In the District Court for the District of Alaska, Second Division.

Term Minutes, General, 1912, Term, beginning February 5, 1912.

Saturday, April 13, 1912, at 10 A. M.

Court convened pursuant to adjournment.

Hon. CORNELIUS D. MURANE, District Judge, presiding.

Upon the convening of Court the following proceedings were had:

1176.

MIOCENE DITCH CO.

vs.

T. A. CAMPION et al.

[Memorandum Re Setting of Cases for Trial.]

Upon motion of Mr. G. J. Lomen, the trial of this cause was set for 10 A. M. Monday, April 15, 1912.

[73]

[Minutes—April 15, 1912.]

In the District Court for the District of Alaska, Second Division.

Term Minutes, General, 1912, Term, beginning February 5, 1912.

Monday, April 15, 1912, at 10 A. M.

Court convened pursuant to adjournment.

Hon. CORNELIUS D. MURANE, District Judge, presiding.

Upon the convening of Court the following proceedings were had:

[Minutes of Trial—April 15, 1912.]

1176.

MIOCENE DITCH CO.

vs.

T. A. CAMPION et al.

This cause came on regularly for trial, Mr. G. J. Lomen appearing for the plaintiff and Mr. Geo. D. Schofield for the defendants.

Mr. G. J. Lomen presented a stipulation of the parties for the reading of the testimony given at the former trial, which stipulation was ordered filed.

Thereupon Mr. Lomen made a statement of the case for plaintiff. Mr. Lomen then offered in evidence for plaintiff the following described testimony

and exhibits, which were admitted in evidence without objection.

Upon consent of Mr. Geo. D. Schofield, attorney for the defendants, said testimony was admitted in evidence as found in the bill of exceptions, heretofore filed herein, reading thereof waived and submitted to the Court.

The testimony so admitted is described as follows:

Plaintiff offered in evidence the testimony of J. M. Davidson given upon direct examination as found on pages 1 to 17 inclusive and on page 28 of said bill of exceptions.

Also, blue-print map Nome and Snake Rivers filed and marked Plaintiff's Exhibit "A" at the former trial, and marked Exhibit "A" herein and refiled.

Also blue-print of Nome River and Buffalo Creek filed and marked Plaintiff's Exhibit "B" at the former trial, and marked Exhibit "B" herein and refiled.

Also Articles of Incorporation of Miocene Ditch Company filed and marked Plaintiff's Exhibit "C" at the former trial, and marked Exhibit "C" herein and refiled.

Also testimony of J. H. Montgomery, given upon direct examination and found upon pages 97, 98 and 99 of said bill of exceptions.

Also the testimony of R. M. B. Tidd, as given upon direct examination and found upon pages 111 to 119, inclusive, of said bill of exceptions.

Plaintiff then offered in evidence deed, R. M. B. Tidd to Miocene Ditch Co., dated June 9, 1902, marked Plaintiff's Exhibit "E" at the former trial,

and re-marked Plaintiff's Exhibit "E" herein and refiled.

Also the testimony of Ira D. Orton, given upon direct examination and found upon page 124 of said bill of exceptions.

Also the testimony of Charles D. McDermott, as given upon direct examination and found upon pages 128 and 129 of said bill of exceptions.

Also the testimony of C. S. Brooks, as given upon direct examination and found upon page 140 of said bill of exceptions.

Also, notice of water location, signed by R. M. B. Tidd, marked Plaintiff's Exhibit "F" and filed at the former trial hereof, and re-marked Plaintiff's Exhibit "F" and refiled. [74]

Also deed from Davidson, Leland, Bliss and Metson to Miocene Ditch Co., dated March 7, 1902, and marked Plaintiff's Exhibit "G" at the former trial hereof and re-marked Plaintiff's Exhibit "G" and refiled.

Also a deed from Davidson, Leland, Bliss and Metson to the Miocene Ditch Co., dated October 4, 1902, and marked Plaintiff's Exhibit "H" at the former trial hereof, and re-marked Plaintiff's Exhibit "H" and refiled.

Also the testimony of J. M. Davidson, as given upon direct examination and found upon pages 167 to 174, inclusive, of said bill of exceptions.

Also testimony of Fred Miller, as given upon direct examination and found upon pages 175 to 178, inclusive, of said bill of exceptions.

Also the testimony of Gus Anderson, as given upon

direct examination and found upon pages 183 to 187, inclusive, of said bill of exceptions.

Also the testimony of David H. Davidson, as given upon direct examination and found upon pages 191 to 199, inclusive, of said bill of exceptions.

Also testimony of Arthur D. Jett, as given upon direct examination and found upon pages 204 to 209, inclusive, of said bill of exceptions.

Also notice of location of the waters of Nome River in 1900 by C. S. Sinclair and W. A. Abernathy, marked Plaintiff's Exhibit "I" at the former trial, and re-marked Plaintiff's Exhibit "I" and refiled.

Also original deed Abernathy and Sinclair to Hammond, dated August 14, 1900, marked Plaintiff's Exhibit "J" at the former trial and re-marked Plaintiff's Exhibit "J" herein and refiled.

Also, original deed, Hammond to Miocene Ditch Co., dated April 9, 1903, attached to the deposition of I. B. Hammond, marked Exhibit "A" and marked at the former trial Plaintiff's Exhibit "K," and re-marked herein Plaintiff's Exhibit "K" and refiled.

Also testimony of A. G. Blake, as given upon direct examination and found upon page 225 of said bill of exceptions.

Also, admission by the defendant that the flume in the Miocene Ditch system below Hobson was constructed and will carry 6,000 miner's inches of water, found on the bottom of page 225 of said bill of exceptions.

Also testimony of G. M. Ashford, given upon di-

rect examination and found upon page 226 of said bill of exceptions.

Also, testimony of I. B. Hammond, as given upon direct examination and found upon pages 227 to 234, inclusive, of said bill of exceptions.

Also tracing marked Plaintiff's Exhibit "A" to the deposition of I. B. Hammond, found upon page 230 of said bill of exceptions.

Also letter Chord Bros. to Mr. Harry White, introduced in evidence at the former trial and marked Plaintiff's Exhibit "B-2" to the deposition of I. B. Hammond, copy thereof being found upon pages 233 and 234 of said bill of exceptions.

Also the testimony of W. G. Hoag, as given upon direct examination and found upon pages 244 to 246, inclusive, of said bill of exceptions.

Also the testimony of W. S. Bliss, as given upon direct examination and found upon pages 252 to 262, inclusive, of said bill of exceptions.

Also a statement of the amount of water from September 1 to 30, 1903, marked Plaintiff's Exhibit "L" at the former trial, and re-marked Plaintiff's Exhibit "L" herein and refiled.

Also the testimony of W. L. Leland, as given upon direct examination and found upon pages 274 to 283, inclusive, of said bill of exceptions.

Also location notice waters Hobson creek, dated August 2, 1901, marked Plaintiff's Exhibit "M" at the former trial hereof, [75] and re-marked Plaintiff's Exhibit "M" herein and refiled.

Also the testimony of T. M. Gibson, as given upon direct examination and found upon pages 298 and

299 of said bill of exceptions.

Also the testimony of J. T. Price, as given upon direct examination and found upon page 301 of said bill of exceptions.

Also the testimony of Jafet Lindeberg, as given upon direct examination and found upon pages 302 and 303 of said bill of exceptions.

Also the testimony of J. M. Davidson, as given upon redirect examination and found on page 304 of said bill of exceptions.

Also the testimony of W. S. Bliss, given upon redirect examination and found upon pages 305 and 306 of said bill of exceptions.

Also the testimony of T. M. Reed, as given upon direct examination and found upon pages 306 to 308 of said bill of exceptions.

Also, location notices, water rights, Volume 71, Nome Precinct, marked Exhibit "N" at the former trial hereof, and re-marked Plaintiff's Exhibit "N" herein and refiled.

Also the testimony of W. L. Leland, given upon redirect examination and found upon page 309 of said bill of exceptions.

Also the testimony of A. E. Southward, given upon direct examination and found upon pages 322 and 323 of said bill of exceptions.

Also the testimony of B. Deleray, given upon direct examination and found upon pages 324 and 328 of said bill of exceptions.

Also power of attorney, W. H. Metson to Ira D. Orton, dated April 20, 1900, marked Exhibit "O" at the former trial, and marked Exhibit "O" herein

and refiled; found on page 325 of said bill of exceptions.

Mr. G. J. Lomen thereupon asked leave of Court to file supplemental complaint. Permission was granted and plaintiff directed to file said supplemental complaint by to-morrow morning. [76]

[Minutes of Trial—April 16, 1912.]

In the District Court for the District of Alaska, Second Division.

Term Minutes, General, 1912, Term, beginning February 5, 1912.

Tuesday, April 16, 1912, at 10 A. M.

Court convened pursuant to adjournment.

Hon. CORNELIUS D. MURANE, District Judge, presiding.

Upon the convening of Court the following proceedings were had:

1176.

MIOCENE DITCH CO.

vs.

T. A. CAMPION et al.

Upon motion of plaintiff's attorney Mr. G. J. Lomen, Plaintiff's Exhibit "A" offered in evidence yesterday, was permitted to be withdrawn and a blueprint showing Hobson and Glacier creek ditch systems marked Exhibit "D" at former trial substituted in lieu thereof, marked Exhibit "D" and refiled.

Answer to plaintiff's second supplemental complaint filed. F. R. Cowden, Art Gibson and H. O.

Winquist were each called, sworn and testified on behalf of plaintiff.

Plaintiff rests.

Thereupon Mr. Geo. D. Schofield, on behalf of defendant, moved the court for a nonsuit against plaintiff.

Motion taken under advisement by the Court.

Defendant rests.

Plaintiff rests.

Thereupon Mr. G. J. Lomen, on behalf of plaintiff, moved the Court for judgment as prayed for in its complaint and supplemental complaints. [77]

[Minutes—April 20, 1912.]

In the District Court for the District of Alaska, Second Division.

Term Minutes, General, 1912, Term, beginning February 5, 1912.

Saturday, April 20, 1912, at 10 A. M.

Court convened pursuant to adjournment.

Hon. CORNELIUS D. MURANE, District Judge, presiding.

Upon the convening of Court the following proceedings were had.

1176.

MIOCENE DITCH CO.

vs.

T. A. CAMPION et al.

The Court rendered its decision herein, overruling defendant's demurrer to the evidence and denying

defendant's motion for a nonsuit.

Thereupon defendant announced that he would stand upon his demurrer to the evidence and motion for a nonsuit, and thereupon the Court ordered judgment for plaintiff as prayed for in its complaint and directed attorney for plaintiff to prepare and submit Findings of Fact and Conclusions of Law. [78]

[Minutes—April 27, 1912.]

In the District Court for the District of Alaska, Second Division.

Term Minutes, General, 1912, Term, beginning February 5, 1912.

Saturday, April 27, 1912, at 10 A. M.

Court convened pursuant to adjournment.

Hon. CORNELIUS D. MURANE, District Judge,
presiding.

Upon the convening of Court the following proceedings were had:

1176.

MIOCENE DITCH CO.

vs.

T. A. CAMPION et al.

The Court continued until Saturday next the signing of findings and decree herein. [79]

In the District Court for the District of Alaska, Second Division.

MIOCENE DITCH COMPANY, a Corporation,
Plaintiff,

vs.

CAMPION MINING & TRADING COMPANY, a
Corporation,
Defendant.

BE IT FURTHER REMEMBERED, that thereafter the following proceedings were had in relation to said petition in intervention, as set forth in the minutes of the Court, in words and figures as follows:
[80]

In the District Court for the District of Alaska, Second Division.

No. 1176.

MIOCENE DITCH COMPANY, a Corporation,
Plaintiff,

vs.

CAMPION MINING & TRADING COMPANY, a
Corporation,
Defendant.

Petition in Intervention.

Now comes Wild Goose Mining & Trading Company, a corporation, and files this, its petition, for an order of intervention in the above-entitled cause, and as the grounds of its intervention alleges as follows:

1. Petitioner Wild Goose Mining & Trading Company is a corporation organized, existing and doing business as a corporation under the laws of the State of California.

2. The complaint in the above-entitled action was filed in the above-named court on the 8th day of August, 1904; thereafter such cause proceeded to trial before the court, sitting without a jury, and the same was submitted to the Court for its decision on July 13th, 1905. Messrs. W. H. Metson and Ira D. Orton appeared for the plaintiff, and William A. Gilmore and Dudley Du Bose, as attorneys for the defendants. In the month of July, 1905, the plaintiff dismissed the action as to the defendant T. A. Campion, and the Campion Mining & Trading Company is now the only party defendant to said action. During said month of July, 1905, and after said cause had been submitted to the Court for decision, and during the absence of Mr. Gilmore, leading attorney for the defendants, from the District of Alaska, a stipulation was entered into by Ira D. Orton as attorney for plaintiff, and Dudley Du Bose, one of the attorneys for the defendant, whereby an amended complaint was directed to be filed and an [81] answer thereto, and a reply to the answer, said answer purporting to be the answer of the defendant Campion Mining & Trading Company, and also stipulating as to the terms of the decision which should be made by the Judge, and thereafter on the 26th day of July, 1905, the sitting Judge, Hon. Alfred S. Moore, rendered his decision in the said cause, in accordance with said

stipulation, and the same was filed in the records of this cause.

Thereafter, and on the 4th day of September, 1905, the defendants by their attorneys, William A. Gilmore, C. S. Johnson, A. J. Daly and John J. Reagen, moved the Court to set aside said decree and strike from the files of the court said amended complaint and the answer and reply thereto, upon the ground and for the reasons that said amended pleadings, findings, conclusions of law and decree, signed and entered, were filed, signed and entered under a misapprehension by the Court, and that said defendant *Campion Mining & Trading Company*, had not consented to and authorized the same to be filed, signed and entered; that said pleadings, findings, conclusions and decree constituted a fraud upon the defendants, and were procured fraudulently.

Thereafter, after full hearing, said motion was submitted to the Court for decision, and on the 16th day of September, 1905, the Court made and entered its order, that the said stipulation and pleadings, consisting of the stipulation, complaint, answer and reply, be stricken from the records and files of the court, and that the said decree entered on the 26th day of July, 1905, together with the findings of fact, conclusions of law, be set aside, annulled, vacated and held for naught; and further ordering that the said cause be resubmitted to the Court for final decision under the pleadings and evidence in the cause as submitted on July 13, 1905.

Thereafter, such proceedings were had that an appeal was perfected by the said plaintiff, to the United

States Circuit Court [82] of Appeals for the 9th Circuit, from said order and decree of Sept. 16, 1905. Thereafter, such proceedings were had in said cause, that on the 29th day of September, 1905, the United States Circuit Court of Appeals issued under its seal, an alternative writ of certiorari, directed to the Hon. Alfred S. Moore and others, to review the proceedings of this Court, with relation to the setting aside of said stipulation, decision, findings and decree of July 26, 1905.

Thereafter, and on the —— day of ———, 190—, the said order of this Court of Sept. 16, 1905, was affirmed by the said Circuit Court of Appeals, and the cause remanded to the District Court of the District of Alaska, Second Division, for further proceedings, in accordance with said decision.

Thereafter, and on October 26, 1908, Hon. Alfred S. Moore, then Judge of said District Court, rendered a final opinion in favor of the defendant and against the plaintiff herein; and thereafter and on January 4, 1909, the Court filed its final decision dismissing the said action.

Thereafter an appeal was perfected by the plaintiff from said final decree, and the transcript on said appeal was mailed by the Clerk of the District Court for the Second Division, to the United States Circuit Court of Appeals, on or about January 18, 1911.

Thereafter, and on the 6th day of October, 1911, the said United States Circuit Court of Appeals reversed said judgment of the District Court, and by its mandate remanded said cause to the said District Court for a retrial; said order of reversal was made

upon the stipulation of attorneys for appellants and appellee, filed in said Circuit Court of Appeals on September 5, 1911; said mandate also ordered costs for the appellant, plaintiff herein, taxing the same at the sum of \$738.15. Said mandate was filed in the office of [83] the Clerk of the District Court herein on October 23, 1911.

3. Petitioner herein avers that at the date of filing said stipulation of reversal in said Circuit Court of Appeals on said September 5, 1911, and for a long time prior thereto, the plaintiff and defendant herein well knew that the Wild Goose Mining & Trading Company, petitioner herein, had succeeded by mesne conveyances to all the right, title and interest of the said Campion Mining & Trading Company, in and to the subject matter of the estate claimed by the plaintiff in this cause, and in and to the title and rights of the defendant.

Petitioner avers that said order of reversal in said Circuit Court of Appeals, of this cause, was procured by fraud and collusion between plaintiff and defendant, for the purpose of cheating and defrauding this petitioner, the Wild Goose Mining & Trading Company from its rights in the substance of the estate of the defendant, Campion Mining & Trading Company.

Petitioner further avers that said stipulation was filed in the said Circuit Court of Appeals, and said order of reversal was made without notice to your petitioner, and was so done with the intent to cheat and defraud your petitioner of all its rights in the subject matter of the estate involved in this action.

4. Petitioner further avers that during the pendency of this action, as aforesaid, and on or about the 13th day of August, 1906, three separate actions were commenced in the District Court for the Second Division of the District of Alaska, in two of which actions the Beau Mercantile Company, a corporation, was the plaintiff, and in one of which actions John L. Beau was the plaintiff, in all of which actions the Campion Mining & Trading Company was defendant, and attachments against the defendant Campion Mining & Trading Company were levied upon the property of said defendant Campion Mining & Trading Company in said actions, and thereafter such proceedings were had in this court that on the 2d day of July, 1907, final judgments [84] were rendered in each of said actions in favor of the plaintiffs therein, and against the Campion Mining & Trading Company, and on the 27th day of July, 1908, writs of execution were issued out of this court, directing and requiring Thomas Cader Powell, United States Marshal of said Second Division, to make the sums due on said judgments, with costs and accruing costs, out of the property attached by him in said actions, and thereafter the said United States Marshal did on the 28th day of August, 1908, sell at public auction all of the said real property theretofore attached by him in said causes, and the same was struck off and sold by said Marshal to John L. Beau in the case of John L. Beau against the Campion Mining & Trading Company, and in the two cases of Beau Mercantile Company, a corporation, to the plaintiff therein, the Beau Mercantile Company.

Thereafter, the said United States Marshal gave said John L. Beau and the said Beau Mercantile Company such certificates as are required by law directed to be given in such cases.

That thereafter, and on or about the 14th day of August, 1909, the said John L. Beau, and the said Beau Mercantile Company, duly assigned to one C. B. Greeley, all the right, title and interest of the said John L. Beau and the said Beau Mercantile Company, a corporation, in and to said certificates of sale and the real estate and other property mentioned therein, which said assignments were duly recorded in the United States Recorder's office for the Cape Nome Precinct, District of Alaska, in Vol. 183, pages 323 and 324 thereof.

Thereafter, and on the 9th day of September, 1908, upon due proceedings being had therein, an order was duly made and entered by the said United States District Court for the Second Division of the District of Alaska, confirming the sales of said real estate so sold on execution as aforesaid, and thereafter and on the 1st day of August, 1911, the said Thomas Cader Powell, United States Marshal, [85] as aforesaid, did make his deeds of all of said property to said C. B. Greeley, which said deeds were duly filed for record on September 18, 1911, in Book 191, pages 79, 81 and 82 of the records of the Cape Nome Recording Precinct. That the property there deeded by the said United States Marshal to said C. B. Greeley is described as follows:

That certain elevator, pipe, buildings, etc., at Dorothy creek; that certain ditch known as the Lower

Campion or Debris ditch, which has its intake at Buffalo creek, and all of the waters of Buffalo creek appropriated thereby; also all of the right, title and interest of the Campion Mining & Trading Company in and to those certain water rights on Buffalo creek. Also that certain ditch known as the High or Upper Campion ditch, which has its intake at Buffalo creek, and all of the waters appropriated thereby. Also all of the right, title and interest of the defendant Campion Mining & Trading Company in and to those certain water rights on Dorothy creek. Also all of the right, title and interest of the defendant Campion Mining & Trading Company in and to those certain water rights on Buffalo creek. All of said real estate and real property being situated in the Cape Nome Recording District, District of Alaska, Second Division, together with all and singular the tenements, hereditaments and appurtenances thereunto belonging, or in anywise appertaining.

That thereafter, and on the — day of —, 190—, the said C. B. Greeley sold, assigned and transferred to your petitioner, Wild Goose Mining & Trading Company, all of his right, title and interest in and to the above described real estate and appurtenances, and your petitioner is now the owner of all of said real estate and appurtenances, and the same comprises the subject matter in litigation in this action.

5. That on the 9th day of September, 1909, a certain action was commenced in the above-named District Court by the filing of a [86] complaint therein, in which said action one F. R. Cowden was

plaintiff, and your petitioner and said C. B. Greeley and others were defendants. In the complaint in said action it was alleged that the United States Marshal's sales of the property above mentioned, upon execution of the Campion Mining & Trading Company, to John L. Beau and the Beau Mercantile Company, and the said assignments of certificates of sale, made to said C. B. Greeley as aforesaid, were fraudulent and void, and it was also alleged in said complaint that the said sales conveyed the substance of the estate of the said Campion Mining & Trading Company, in which said action George D. Schofield was the attorney for said plaintiff, F. R. Cowden.

Thereafter, on October 27, 1909, one Charles Woog by George D. Schofield, his attorney, filed a complaint of intervention in said action, and on January 14, 1910, Frank L. Blackman, for himself and as Receiver of the Campion Mining & Trading Company, filed an answer and cross-complaint in said action. The averments of the complaint in said action were reaffirmed by said complaint in intervention and said cross-complaint and the title of said C. B. Greeley, predecessor in interest of petitioner, to said property was attacked.

To the original complaint and to the complaint of intervention of said Charles Woog, and the answer and cross-complaint of the Campion Mining & Trading Company, the said Frank L. Blackman as its Receiver, said C. B. Greeley, with other defendants in said action, filed demurrers to said pleadings, on the ground that the said complaint did not state facts sufficient to constitute a cause of action against the

said C. B. Greeley or any of said defendants. Thereafter, said several demurrers were sustained by the Court, and the said complainants having elected in open court to stand upon their complaint, answer, cross-complaint and complaint in intervention, and refusing further to plead, the said complaint, answer, cross-complaint, and complaint in intervention, were dismissed, said judgment [87] of dismissal being dated at Nome, Alaska, August 1, 1911, and filed in the records of said cause in this court.

Thereafter, the said plaintiff, F. R. Cowden, cross-complainant Campion Mining & Trading Company, and intervenor Charles Woog, prayed that an appeal be allowed to the United States Circuit Court of Appeals for the 9th Circuit, from said judgment of dismissal, which said appeal was allowed October 28, 1911.

Thereafter, such proceedings were had that on October 30, 1911, a transcript on appeal from said judgment was transmitted by mail to the United States Circuit Court of Appeals for the 9th Circuit, by the Clerk of the said District Court, and the said appeal is still pending in said United States Circuit Court of Appeals.

Petitioner avers that in so far as this Court is concerned, with the said cause, and the subject matter in litigation in this cause, the issues determined therein are *res adjudicata* between the defendant Campion Mining & Trading Company and your petitioner.

6. Your petitioner avers that thereafter such proceedings were had in this cause, that on the 13th

day of April, 1912, and without notice to your petitioner, an order was made by this Court, ordering this cause to be tried on April 15, 1912; that on said April 15th, and without notice to your petitioner, and although the facts heretofore averred in this petition, were well known to the plaintiff and defendant herein, this cause was called for trial, G. J. Lomen, Esq., appearing as attorney for the plaintiff Miocene Ditch Company, and George D. Schofield, Esq., as attorney for Campion Mining & Trading Company, and a stipulation was filed without objection on the part of the defendant Campion Mining & Trading Company, or its attorney George D. Schofield, being as follows:

“IT IS HEREBY STIPULATED by and between the parties to the above-entitled action, that the testimony of the witnesses heretofore taken in the above-entitled court at the former trial of said [88] action may be, by either party, read, subject to all the legal objections and exceptions, at the new trial of said action, in said United States District Court for the District of Alaska, Second Division, or any continuance thereof, whether the said witnesses or any of them, be within the District at the time of the said new trial, or any continuance thereof, or absent therefrom, and that all the parties hereto may introduce at such new trial, or any continuance thereof, further or other evidence, or the same or other witnesses, subject to all legal objections and exceptions as they may be advised; it being further understood that neither the plaintiff nor defendants shall be compelled to produce the witnesses who have

testified on the previous trial.”

Said stipulation is not dated, and is signed Ira D. Orton and Albert Fink, by W. H. Metson, attorneys for plaintiff. George D. Schofield by West & De Journal, attorneys for defendants.

Petitioner avers that the above stipulation was made, entered and filed without notice to your petitioner, by plaintiff herein, Miocene Ditch Company, and defendant herein, Campion Mining & Trading Company, secretly, with the intent and purpose, collusively and fraudulently, to cheat and defraud your petitioner out of its rights in the subject matter of this action.

Petitioner further avers that said stipulation was not signed in person by either said G. J. Lomen or said George D. Schofield, as attorneys for the plaintiff and defendant herein, and the evident intention of the plaintiff and defendant was to fraudulently and collusively deny your intervenor the right of presenting to the court and defending in said action its rights to the subject matter of said action.

That thereupon the said Lomen offered all the testimony taken at the former trial on behalf of the plaintiff, which testimony was admitted by the court, without objection on the part of the defendant Campion Mining & Trading Company, or its said attorney, [89] George D. Schofield. That before adjournment of court on said April 15th, counsel for the plaintiff, Mr. Lomen, asked leave of Court to file a supplemental complaint in said action, alleging new and vital matter to the merits of said action, and permission was thereupon granted to file such sup-

plemental complaint without objection on the part of the said attorney for the defendant. That upon the convening of court for the further trial of said cause on April 16th, said supplemental complaint was filed, and immediately thereafter the defendant, by its said attorney, filed an answer in general terms, denying the averments set forth in said supplemental complaint, and immediately thereafter a reply to said supplemental answer was filed by the attorney for the plaintiff.

That thereafter and on the morning of said April 16th, further evidence was introduced on behalf of the plaintiff in support of the original allegations in the complaint in this action, and at least three witnesses were called on behalf of the plaintiff, as to the matters and things set forth in said supplemental complaint, of all of which your petitioner had no notice. Thereupon the plaintiff submitted its case. Thereupon the defendant *Campion Mining & Trading Company* introduced no evidence, either as provided for in said stipulation or to controvert the evidence introduced by plaintiff on behalf of the new issues raised by said supplemental complaint and the answer and reply thereto, and demurred to the evidence or asked for a nonsuit, upon the evidence and testimony then before the Court. Thereupon the Court took said demurrer or motion under advisement, and thereafter on April 20, 1912, the Court rendered its opinion, overruling and denying said demurrer or motion, and ordered findings and decree to be prepared in favor of the plaintiff and against the defendant, which said findings and decree have

not yet been signed by the Court, nor has the defendant *Campion Mining & Trading Company* offered any evidence to the Court on its behalf. [90]

7. Your petitioner avers that by reason of the marshal's sales and the said marshal's deeds, heretofore described, to said C. B. Greeley, and by the said assignments and transfer of all of the interests of said C. B. Greeley in and to the property described therein, to petitioner, it is now the owner and entitled to the possession of all the real property and appurtenances heretofore described, and further alleges that the same constitute the substance of the estate of the defendant *Campion Mining & Trading Company* now involved in this cause, and it is a necessary and proper party to this action, to the end that the rights of all parties may be fully adjudicated and justice done.

Petitioner further alleges that it and its predecessor in interest has been in the actual possession and use of all the property heretofore described, and which is the subject matter of litigation in this cause.

Petitioner further alleges that the allegations set forth in the supplemental complaint filed in this court on April 16, 1912, were and are wilfully and collusively false, and that if permitted to intervene in this action your petitioner will be able to prove conclusively that it and its predecessor in interest have so been in the possession and use of said property.

8. Your petitioner further avers that the record itself shows that the order of reversal of the judgment heretofore rendered in this court as aforesaid,

made by the said United States Circuit Court of Appeals on October 6, 1911, was procured by collusion and fraud on the part of the plaintiff, Miocene Ditch Company, and the defendant, Campion Mining & Trading Company, and was in fraud of plaintiff's rights in the premises.

WHEREFORE, your petitioner prays:

1. That the submission of this cause for decision so made as aforesaid on the 16th day of April, 1912, be set aside.

2. That your petitioner be allowed to intervene in this [91] action either by the filing of a complaint in intervention or being made a defendant in this action, with permission to file an answer therein, and that petitioner be given time to offer its evidence in support thereof.

3. For such other and further relief as may be meet and agreeable to equity.

ELWOOD BRUNER.

Attorney for Petitioner.

United States of America,
District of Alaska,—ss.

F. M. Ayer, being first duly sworn, deposes and says: That he is the manager and agent of the Wild Goose Mining & Trading Company, a corporation, named in the foregoing petition, and resides at Nome, Alaska; that there is no other officer of said Wild Goose Mining & Trading Company now in the District of Alaska; wherefore he makes this verification. That he has read the above and foregoing petition in intervention, knows the contents thereof, and that

the same is true as he verily believes.

F. M. AYER.

Subscribed and sworn to before me, this 3d day of May, 1912.

[Seal]

J. SULLIVAN,

Notary Public for Alaska, Residing in Nome.

Service of the foregoing petition in intervention is hereby admitted this 4th day of May, 1912.

G. J. LOMEN,

Attorney for Plaintiff.

GEO. D. SCHOFIELD,

Attorney for Defendant.

[Endorsed]: Filed in the office of the Clerk of the District Court of Alaska, Second Division, at Nome. May 4, 1912. John Sundback, Clerk. By J. Allison Bruner, Deputy. [92]

BE IT FURTHER REMEMBERED that thereafter plaintiff filed its Demurrer to said Petition as follows:

And that defendant, Campion Mining & Trading Company, filed its demurrer to said petition as follows: [93]

In the District Court for the District of Alaska, Second Division.

No. —.

MIOCENE DITCH COMPANY, a Corporation,
Plaintiff,

vs.

CAMPION MINING AND TRADING COMPANY, a Corporation,
Defendant.

Demurrer [to Petition in Intervention].

Now comes the plaintiff above named and demurs to and objects to the petition in intervention herein, on the part of the Wild Goose Mining and Trading Company, a corporation, on the ground and for the reason that it appears on the face of said petition that it does not state facts sufficient to entitle the said petitioner to intervene herein.

G. J. LOMEN,

Attorney for Plaintiff.

Due service of the within Demurrer is hereby accepted at Nome, Alaska, this 8th day of May, 1912.

ELWOOD BRUNER,

Attorney for Intervenor.

[Endorsed]: Filed in the office of the Clerk of the District Court of Alaska, Second Division, at Nome. May 8, 1912. John Sundback, Clerk. By J. Allison Bruner, Deputy. [94]

[Demurrer to Petition in Intervention.]

In the District Court for the District of Alaska, Second Division.

MIOCENE DITCH COMPANY, a Corporation,
Plaintiff,

vs.

CAMPION MINING & TRADING COMPANY, a
Corporation,
Defendant.

Defendant demurs to the petition of the Wild Goose Mining & Trading Company, a corporation, filed herein and designated "Petition in Intervention," upon the following grounds:

1. Said petition does not state facts sufficient to constitute a cause of intervention.

2. That there is another action pending between the same parties (Wild Goose Mining & Trading Company and the Campion Mining & Trading Company) for the same cause, and is now on appeal in the United States Circuit Court of Appeals for the Ninth Circuit, and this court has lost jurisdiction of the matters and things alleged and set forth in said pending action, which said matters and things are identical with the allegations set forth in the alleged petition of intervention filed herein.

GEO. D. SCHOFIELD,

Atty. for Defendant.

Service accepted May 7, 1912.

ELWOOD BRUNER,

Atty. for Wild Goose M. & T. Co.,

Petitioner.

[Endorsed]: Filed in the office of the Clerk of the District Court of Alaska, Second Division, at Nome, May 8, 1912. John Sundback, Clerk. By J. Allison Bruner, Deputy. [95]

In the District Court for the District of Alaska, Second Division.

MIOCENE DITCH COMPANY, a Corporation,
Plaintiff,

vs.

CAMPION MINING & TRADING COMPANY, a
Corporation,

Defendant.

BE IT FURTHER REMEMBERED, that certain proceedings were had herein, as shown by the minutes of the Court as follows: [96]

[Minutes—May 4, 1912.]

In the District Court for the District of Alaska, Second Division.

Term Minutes, General, 1912, Term, beginning February 5, 1912.

Saturday, May 4, 1912, at 10 A. M.

Court convened pursuant to adjournment.

Hon. CORNELIUS D. MURANE, District Judge,
presiding.

Upon the convening of court the following proceedings were had:

1176.

MIOCENE DITCH CO.

vs.

T. A. CAMPION et al.

Mr. Elwood Bruner, on behalf of the Wild Goose Mining & Trading Company presented and filed a

petition for leave to intervene; said petition was set for hearing on Wednesday, May 8, 1912, at 10 A. M.
[97]

[Minutes—May 8, 1912.]

In the District Court for the District of Alaska, Second Division.

Term Minutes, General, 1912, Term, beginning February 5, 1912.

Wednesday, May 8, 1912, at 10 A. M.

Court convened pursuant to adjournment.

Hon. CORNELIUS D. MURANE, District Judge, presiding.

Upon the convening of court the following proceedings were had:

1176.

MIOCENE DITCH CO.

vs.

T. A. CAMPION et al.

This being the hour set for hearing of petition of Wild Goose Mining & Trading Company for leave to intervene herein, Mr. Elwood Bruner appeared for the petitioner, Mr. G. J. Lomen for the plaintiff and Mr. Geo. D. Schofield for the defendant Campion Mining & Trading Company.

Mr. G. J. Lomen presented and filed demurrer to said petition on behalf of plaintiff,

Mr. Geo. D. Schofield presented and filed demurrer to said petition on behalf of defendant Campion Mining & Trading Company.

Argument was then had on said demurrers and said

petition by the respective attorneys, and said demurrers and said petition were submitted to the Court for its decision, petitioner being granted until Monday next in which to submit authorities in support of its petition. [98]

[Minutes—May 25, 1912.]

In the District Court for the District of Alaska, Second Division.

Term Minutes, General, 1912, Term, beginning February 5, 1912.

Saturday, May 25, 1912, at 10 A. M.

Court convened pursuant to adjournment.

Hon. CORNELIUS D. MURANE, District Judge, presiding.

Upon the convening of court the following proceedings were had:

1176.

MIOCENE DITCH CO.

vs.

T. A. CAMPION et al.

In this case the Court made the following order:

“The petition of the Wild Goose Mining & Trading Company, a corporation, for leave to intervene in this action by way of complaint or answer having been heretofore submitted to the Court,—

It is hereby ordered that said petition be, and the same is, denied.”

Petitioner was allowed an exception to said order.

Mr. Elwood Bruner, attorney for petitioner, there-

upon requested and was granted twenty days in which to prepare, serve and file a bill of exceptions.

Thereupon the Court signed and filed the Findings of Fact and Conclusions of Law and Decree heretofore submitted by the plaintiff.

Upon application of Mr. Geo. D. Schofield, attorney for the defendant Campion Mining & Trading Company, said defendant was granted sixty days stay of execution and sixty days in which to prepare, serve and file bill of exceptions. [99]

[Minutes—June 1, 1912.]

In the District Court for the District of Alaska, Second Division.

Term Minutes, General, 1912, Term, beginning February 5, 1912.

Saturday, June 1, 1912, at 10 A. M.

Court convened pursuant to adjournment.

Hon. CORNELIUS D. MURANE, District Judge, presiding.

Upon the convening of court the following proceedings were had:

1176.

MIOCENE DITCH CO.

vs.

T. A. CAMPION et al.

Upon motion of Mr. Elwood Bruner, the Wild Goose Mining & Trading Company, petitioner in intervention, was allowed ninety days in which to prepare, serve and file Bill of Exceptions on appeal from

the judgment heretofore made and entered herein on May 25, 1912.

Upon motion of Mr. G. J. Lomen, attorney for plaintiff, the record is to show that said time is granted, provided as a matter of right an appeal may be taken from the judgment by intervenor.

And to make the foregoing matters of record, the said petitioner in intervention presents this Bill of Exceptions and prays that the same may be settled and allowed.

ELWOOD BRUNER,

Attorney for Intervenor. [100]

Service of the within proposed Bill of Exceptions is hereby admitted, at Nome, Alaska, this 11th day of June, 1912.

G. J. LOMEN,

Atty. for Plff.

GEO. D. SCHOFIELD,

Atty. for Dft. Campion M. & T. Co.

[Order Approving, etc., Bill of Exceptions.]

The foregoing Bill of Exceptions is hereby approved, allowed and settled.

Dated at Nome, Alaska, this twelfth day of June, A. D. 1912.

CORNELIUS D. MURANE,

District Judge.

[Endorsed]: No. 1176. Dist. Court, Sec. Division, Alaska. Miocene Ditch Company, a Corporation, Plaintiff, vs. Campion Mining & Trading Co., a Corporation, Defendant. Proposed Bill of Exceptions. Filed in the office of the Clerk of the District Court

of Alaska, Second Division, at Nome. Jun. 11, 1912.
John Sundback, Clerk. By J. Allison Bruner,
Deputy.

Refiled in the office of the Clerk of the District
Court of Alaska, Second Division, at Nome. Jun.
12, 1912. John Sundback, Clerk. By ————,
Deputy. [101]

*In the District Court for the District of Alaska, Sec-
ond Division.*

MIOCENE DITCH COMPANY, a Corporation,
Plaintiff,

vs.

CAMPION MINING & TRADING COMPANY, a
Corporation,
Defendant.

Assignment of Errors.

Comes now the petitioner, the Wild Goose Mining
& Trading Company, a corporation, in intervention,
in the above-entitled action, and assigns the following
errors as having been committed by the above-en-
titled court in making and entering herein on May
25th, 1912, its order denying and refusing petitioner
the right to intervene in said action, on which said
errors the said petitioner in intervention intends to
and does rely on its appeal from said order to the
United States Circuit Court of Appeals for the Ninth
Circuit:

1. The Court erred in making its order refusing
and denying petitioner the right to intervene in the

above-entitled action, for the reason that the uncontroverted facts set forth in petitioner's petition in intervention, are sufficient in law to entitle petitioner to an order of the Court, permitting it to intervene as prayed for in its petition.

WHEREFORE, said petitioner prays that said order be reversed and petitioner be allowed to intervene in said action.

ELWOOD BRUNER,

Attorney for Petitioner in Intervention.

Service admitted June 13th, 1912.

G. J. LOMEN,

Attorney for Plaintiff.

GEO. D. SCHOFIELD,

Attorney for Defendant Campion Mining & Trading Company. [102]

[Endorsed]: No. 1176. Dist. Court, Sec. Division, Alaska. Miocene Ditch Company, Plff., vs. Campion Mining & Trading Company, Dft. Assignment of Errors. Filed in the office of the Clerk of the District Court of Alaska, Second Division, at Nome. Jun. 13, 1912. John Sundback, Clerk. By J. Allison Bruner, Deputy. Elwood Bruner, Attorney for Petitioner in Intervention. [103]

In the District Court for the District of Alaska, Second Division.

MIOCENE DITCH COMPANY, a Corporation,
Plaintiff,

vs.

CAMPION MINING & TRADING COMPANY, a
Corporation,

Defendant.

Petition for an Order Allowing Appeal.

The Wild Goose Mining & Trading Company, the petitioner in intervention in the above-entitled action, feeling itself aggrieved by the order of the above-entitled court, denying and refusing to allow the petitioner to intervene in said action, said order having been made and entered on the 25th day of May, 1912, hereby appeals from said order to the United States Circuit Court of Appeals for the 9th Circuit, and prays the said appeal be allowed.

Dated, at Nome, Alaska, June 13th, 1912.

ELWOOD BRUNER,
Attorney for Petitioner.

[Order Approving Bond on Appeal.]

The foregoing appeal is hereby allowed; the said petitioner in intervention, Wild Goose Mining & Trading Company, to give bond for costs in the sum

126 *Wild Goose Mining and Trading Company*
of \$250.00, to be approved by the undersigned.

Dated, Nome, Alaska, June 13th, 1912.

CORNELIUS D. MURANE,
District Judge.

Service admitted, this 13th day of June, 1912.

G. J. LOMEN,
Attorney for Plaintiff.

GEO. D. SCHOFIELD,
Attorney for Defendant, *Campion Mining & Trading Company*. [104]

[Endorsed]: No. 1176. Dist. Court, Sec. Div., Alaska. *Miocene Ditch Company*, Plff., vs. *Campion Mining & Trading Co.*, Dft. Petition for an Order Allowing Appeal. Filed in the office of the Clerk of the District Court of Alaska, Second Division, at Nome. Jun. 13, 1912. John Sundback, Clerk. By J. Allison Bruner, Deputy. Elwood Bruner, Attorney for Petitioner in Intervention. [105]

In the District Court for the District of Alaska, Second Division.

MIOCENE DITCH COMPANY, a Corporation,
Plaintiff,

vs.

CAMPION MINING & TRADING COMPANY, a
Corporation,
Defendant.

Bond on Appeal.

KNOW ALL MEN BY THESE PRESENTS
that we, *Wild Goose Mining & Trading Company*, a

corporation, as principal, and G. R. Jackson and J. V. Sheldon, sureties, are held and firmly bound unto the Miocene Ditch Company, a corporation, plaintiff in the above-entitled action, and Champion Mining & Trading Company, a corporation, defendant in said action, in the sum of Two Hundred and Fifty Dollars (\$250), for the payment of which, well and truly to be made, we bind ourselves and our and each of our heirs, executors, administrators and assigns, firmly by these presents.

SEALED with our seals, and dated this 12th day of June, A. D. 1912.

WHEREAS, lately, at a session of the United States District Court for the District of Alaska, Second Division, in an action pending in said Court, between Miocene Ditch Company, a corporation, as plaintiff, and Champion Mining & Trading Company, a corporation, defendant, an order was made in said action, whereby petitioner Wild Goose Mining & Trading Company was denied the right to intervene either as plaintiff or defendant in said action, and the said petitioner in intervention, Wild Goose Mining & Trading Company, having obtained an order from the said District Court, allowing an appeal to the United States Circuit Court of Appeals for the 9th [106] Circuit, and the citation to said Miocene Ditch Company, a corporation, plaintiff in said action, and to said Champion Mining & Trading Company, a corporation, defendant in said action;

NOW, THEREFORE, the condition of the above obligation is such that if the said Wild Goose Min-

ing & Trading Company, said petitioner in intervention, shall prosecute its said appeal to effect and answer all costs if it fails to make its plea good, then this obligation shall be void; otherwise it shall be and remain in full force and effect.

WILD GOOSE MINING & TRADING
COMPANY,

By J. DENNIS ARNOLD, Pres. [Seal]

G. R. JACKSON, [Seal]

J. V. SHELDON, [Seal]

Sureties.

United States of America,

District of Alaska,—ss.

G. R. Jackson and J. V. Sheldon, being first duly sworn, each deposes and says: That he is worth the sum of \$250.00 over and above all debts and liabilities, and exclusive of property exempt from execution.

G. R. JACKSON.

J. V. SHELDON.

Subscribed and sworn to before me, this 13th day of June, 1912.

[Notarial Seal]

O. D. COCHRAN,

Notary Public for Alaska, Residing in Nome.

On this 13 day of June, 1912, the foregoing bond being presented in open court, is hereby approved.

CORNELIUS D. MURANE,

District Judge.

OK.—G. J. L. [107]

[Endorsed]: No. 1176. Dist. Court, Sec. Div., Alaska. Miocene Ditch Company, a Corporation,

Plff., vs. Campion Mining & Trading Co., Dft. Bond on Appeal. Filed in the office of the Clerk of the District Court of Alaska, Second Division, at Nome. Jun. 13, 1912. John Sundback, Clerk. By J. Allison Bruner, Deputy. Elwood Bruner, Attorney for Petitioner in Intervention. [108]

In the District Court for the District of Alaska, Second Division.

MIOCENE DITCH COMPANY, a Corporation,
Plaintiff,

vs.

CAMPION MINING & TRADING COMPANY,
a Corporation,

Defendant.

Order [Extending Time for Filing, etc., Transcript on Appeal].

GOOD CAUSE appearing therefor, it is hereby

ORDERED, that the time for filing and docketing the Transcript on Appeal in the above-entitled cause, in the office of the Clerk of the Circuit Court of Appeals for the Ninth Circuit, be, and hereby is, extended to and including the 1st day of September, A. D. 1912.

Dated Nome, Alaska, June 13, 1912.

CORNELIUS D. MURANE,
District Judge.

[Endorsed]: No. 1176. Dist. Court, Sec. Div., Alaska. Miocene Ditch Company, a Corporation, Plaintiff, vs. Campion Mining & Trading Company, Defendant. Order. Filed in the office of the Clerk

130 *Wild Goose Mining and Trading Company*
of the District Court of Alaska, Second Division, at
Nome. Jun. 13, 1912. John Sundback, Clerk. By
J. Allison Bruner, Deputy. Elwood Bruner, Attor-
ney for Petitioner in Intervention. [109]

UNITED STATES OF AMERICA.

District Court, District of Alaska, Second Division.

Cause No. 1176.

MIOCENE DITCH COMPANY, a Corporation,
Plaintiff,

vs.

T. A. CAMPION et al.,

Defendants.

Praeceptum [for Transcript on Appeal].

To the Clerk of the Above-entitled Court:

You will please make transcript of record on ap-
peal, including Bill of Exceptions and all appeal
papers.

ELWOOD BRUNER,
Attorney for Petitioner in Intervention.

[Endorsed]: Cause No. 1176. District Court, Dis-
trict of Alaska, Second Division. Miocene Ditch
Company, a Corporation, Plaintiff, vs. T. A. Cam-
pion et al., Defendants. Praeceptum. Filed in the office
of the Clerk of the District Court of Alaska, Second
Division, at Nome. Jun. 14, 1912. John Sundback,
Clerk. By J. A. Bruner, Deputy. [110]

In the District Court for the District of Alaska, Second Division.

No. 1176.

MIOCENE DITCH COMPANY, a Corporation,
Plaintiff,

vs.

T. A. CAMPION and the CAMPION MINING
AND TRADING COMPANY, a Corporation,
Defendants.

Clerk's Certificate [to Transcript of Record].

I, John Sundback, Clerk of the District Court of Alaska, Second Division, do hereby certify that the foregoing typewritten pages, from 1 to 110, both inclusive, are a true and exact transcript of the Bill of Exceptions (including pleadings, etc.), Assignment of Errors, Petition for an Order Allowing Appeal and Order Allowing Appeal, Bond on Appeal, Order Enlarging Time to Docket Transcript on Appeal and Praecipe for Transcript on Appeal, in the case of Miocene Ditch Company, a Corporation, Plaintiff, vs. T. A. Campion et al., Defendants, No. 1176-Civil, this court, and of the whole thereof, as appears from the records and files in my office at Nome, Alaska; and further certify that the original Citation in the above-entitled cause is attached to this transcript.

Cost of transcript \$42.05, paid by Elwood Bruner, attorney for petitioner in intervention.

IN WITNESS WHEREOF, I have hereunto set

my hand and affixed the seal of said court this 19th day of June, A. D. 1912.

[Seal]

J. SUNDBACK,
Clerk. [111]

In the District Court for the District of Alaska, Second Division.

MIOCENE DITCH COMPANY, a Corporation,
Plaintiff,

vs.

CAMPION MINING & TRADING COMPANY,
a Corporation,
Defendant.

Citation.

United States of America,
District of Alaska,—ss.

The President of the United States of America, to
Miocene Ditch Company, a Corporation, Plaintiff
Above Named, and to Campion Mining &
Trading Company, a Corporation, Defendant
Above Named, Greeting:

YOU ARE HEREBY cited and admonished to be
and appear at the United States Circuit Court of
Appeals for the 9th Circuit, to be held at the city
of San Francisco, in the State of California, on the
12th day of July, 1912, pursuant to an appeal filed
in the Clerk's office of the District Court for the Dis-
trict of Alaska, Second Division, wherein Wild Goose
Mining & Trading Company is appellant, and you,
said Miocene Ditch Company, a corporation, and
Campion Mining & Trading Company, a corporation,

are appellees, to show cause, if any there be, why an order denying petitioner the right to intervene in said appeal mentioned should not be corrected and speedy justice done to the parties in that behalf.

WITNESS the Honorable EDWARD DOUGLAS WHITE, Chief Justice of the Supreme Court of the United States, this 13th [112] day of June, A. D. 1912, and of the Independence of the United States the one hundred and thirty-sixth.

CORNELIUS D. MURANE,
Judge of the District Court for the District of
Alaska, Second Division.

Attest: J. SUNDBACK,
Clerk of the District Court for the District of Alaska,
Second Division.

Personal service of the foregoing citation, made on me, and receipt of a copy thereof, admitted this 13th day of June, A. D. 1912.

G. J. LOMEN,
Attorney for Plaintiff, Miocene Ditch Company.
GEO. D. SCHOFIELD,
Attorney for Defendant, Campion Mining & Trading
Company. [113]

[Endorsed]: No. 1176. Dist. Court, Sec. Div.,
Alaska, Miocene Ditch Company, Plff., vs. Campion
Mining & Trad. Co., Dft. Citation. [114]

[Endorsed]: No. 2174. United States Circuit Court of Appeals for the Ninth Circuit. Wild Goose Mining & Trading Company, a Corporation, Appellant, vs. The Miocene Ditch Company, a Corporation, and Campion Mining & Trading Company, a Corporation, Appellees. Transcript of Record. Upon Appeal from the United States District Court for the District of Alaska, Second Division.

Received July 12, 1912.

F. D. MONCKTON,
Clerk.

Filed August 20, 1912.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Meredith Sawyer,
Deputy Clerk.

13
2



